S. Hrg. 100-601

INDIAN TRIBAL TAXATION

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1039

TO REVIEW AND DETERMINE THE IMPACT OF INDIAN TRIBAL TAXATION ON INDIAN RESERVATIONS AND RESIDENTS

NOVEMBER 12, 1987
WASHINGTON, DC

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INDIAN TRIBAL TAXATION

THURSDAY, NOVEMBER 12, 1987

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room 485, Russell Senate Office Building, Hon. John Melcher (acting chairman of the committee) presiding.

Present: Senators Melcher and Murkowski.

Senator MELCHER. This morning, we are holding a hearing on S. 1039 which is a bill to review and determine the impact of Indian tribal taxation on Indian reservations and residents.

The bill speaks for itself. It is a rather short bill requiring a study commission appointed by the President and a study to determine what limitations should be applied by Congress to the authority to tax non-Indians on the reservation by tribes. It also carries with it the requirement that the commission report within 1 year on their recommendations to the Congress. In addition to that, the bill provides authorization for funding for educational purposes, economic opportunity, and health care on Indian reservations for the next 2 years.

[Text of S. 1039 follows:]

100TH CONGRESS
1ST SESSION

S. 1039

To review and determine the impact of Indian tribal taxation on Indian reservations and residents.

IN THE SENATE OF THE UNITED STATES

APRIL 10 (legislative day, MARCH 30), 1987

Mr. MELCHER (for himself, Mr. SIMPSON, and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

---

A BILL

To review and determine the impact of Indian tribal taxation on Indian reservations and residents.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS

SEC. 2. The Congress finds that—

(a) numerous Indian tribes are imposing tax ordinances to provide revenues;

(b) for six years Federal funding for Indian programs has been reduced;

(c) nontribal persons on reservations have protested the imposition of tribal taxes;

(d) some of the tax proposals will have an adverse economic impact on reservations to the disadvantage of both tribal and nontribal persons residing on reservations; and

(e) it is essential and necessary that Congress review Indian tribal authority to impose taxes on nontribal persons on Indian reservations.

Sec. 3. The Secretary of the Interior shall review all tax ordinances proposed by an Indian tribe which would be imposed upon nontribal persons on an Indian reservation.

Sec. 4. The review required in section 3 of this Act is a trust responsibility of the Federal Government.

Sec. 5. No proposed tribal tax codes to be imposed upon nontribal persons on an Indian reservation will be implemented unless approved by the Secretary of the Interior.

Sec. 6. The Secretary of the Interior shall not approve any tribal tax ordinances during the two-year period following enactment of this Act.

Sec. 7. The President shall appoint a Commission to review the economic impact which tribal taxes have upon Indian reservations and report to Congress within one year after enactment of this Act.

Sec. 8. For the two years following enactment of this Act, $450,000,000 is authorized per year to be made available to the Secretary of the Interior to alleviate economic hardship on Indian reservations and to assist with emergency educational and employment needs, and $75,000,000 per year is authorized to be made available to the Secretary of Health and Human Services to alleviate emergency health care needs on Indian reservations.

○

Senator **Melcher**. First of all, I would like to make Chairman Inouye's statement a part of the record. He regrets that he is unable to be here this morning.

In addition, we have a statement from Senator Simpson which will become part of the record.

[Prepared statements of Senators Inouye and Simpson appears in the appendix.]

Senator **Melcher**. Our first witness this morning will be Frank Ryan, Deputy to the Assistant Secretary for Indian Affairs. Mr. Ryan?

Mr. **Reeser**. Mr. Chairman, Mr. Ryan hasn't arrived yet. Can you take him out of order after the other witnesses?

Senator **Melcher**. Oh, sure. Has he had some trouble getting in?

Mr. **Reeser**. Yes; Mr. Chairman.

Senator **Melcher**. Well, some of our witnesses may have had trouble, too.

The next witness we have on the list is Senator Delwyn Gage of the Montana State Senate. You made it all right, Delwyn.

Mr. **Gage**. Eventually, yes.

Senator **Melcher**. Senator Gage is from the Montana Senate, District 5. He is chairman of the Indian Affairs Committee of the Montana State Legislature, and he comes from Cut Bank, MT.

Please proceed, Delwyn.

STATEMENT OF HON. DELWYN GAGE, SENATOR, MONTANA STATE SENATE

Mr. **Gage**. Thank you, Senator Melcher.

I am, for the record, Senator Del Gage from Cut Bank, MT. I serve Senate District 5. This district comprises all of Glacier County and about two-thirds of Pondera County in which is located the Blackfeet Indian Reservation.

In past years, the Blackfeet Tribe has implemented taxes on oil and gas production on the Blackfeet Reservation and, more recently, a possessory interest tax on primarily utility companies that operate within the boundaries of the reservation.

I am not here to dispute the right of the tribes to tax. The problems that are involved in this whole thing, as I perceive it, stem from the fact that these taxes are going to affect, I think, the economic development of the reservation when the tribe and the State and its subdivisions are also taxing.

I think if you look at the oil and gas sales on the reservations that have implemented a tax on oil and gas, those sales have decreased, and I am not going to try to tell you that is solely because of taxation. There are other factors involved as well, but the oil industry has told us time and time again that they are not interested in operating in areas where their costs are going to be in excess of costs in other areas where they might be able to operate.

The effect of the recent possessory interest tax is not just reservation-wide. It is also affecting many off of the reservation. The Glacier Electric Co-op, for instance, an REA which operates in Glacier County, is one of those which will be assessed a possessory interest tax, and they are passing that tax on to their customers both on and off the reservation. So, those customers who are off the reservation are also paying a part of the tax that the Co-op is paying to the Blackfeet Tribe.

There is no question in my mind that Mountain Bell, Montana Power Company, Burlington Northern, and any of the others who pay this tax will ultimately pass that on to consumers who will be both on and off the reservation, and that does have an economic effect on Montana, both on and off the reservation.

It seems strange to me that we have a situation gone this far where both the State and its subdivisions and a tribal government are able to tax the same property. The State of Montana, for instance, has almost no jurisdiction on any Indian reservation, but they are still taxing on Indian reservations, and I think it is incumbent upon Congress and perhaps this committee that is being suggested in this bill to make that determination as to whether or not those kinds of double taxes can be assessed as well as the effects they are going to have.

I think this double taxation that is happening, in large part, is going to be a tremendous stumbling block to the Indian Self-Determination Act that Congress passed because of the fact that although those businesses that are there probably will stay there, many of them are going to be facing larger costs. It is going to be an impediment and a discouragement to those who might want to come on the reservations and establish businesses, and I think it is going to be another step in limiting self-determination for the Indian people.

I have further testimony that I have presented to the Past President's Commission on Indian Economies as well as some other testimony that I have presented that will give you further details on my concerns with regard to taxation. We have all heard statements about taxation without representation and those kinds of things, and courts have addressed a lot of those issues, but I think it is time that Congress made some firm statements and commitments as to what States can do with regard to taxation on reservations, both with regard to Indian people and non-Indians.

The State of Montana and the County of Glacier, for instance, and Pondera County in which the Blackfeet Nation is partly located have limiting taxing authority on reservations in that the State of Montana cannot tax the income of the Indian people that is made on the reservations. They do not pay tax on their vehicles on the reservation. Of course, the trust property is not taxed, and yet, the county and the State, deprived of those sources of revenue, are still required to provide the services that are necessary in addition to the services that the tribe may provide on the reservation.

So, it is a tremendous problem, and I think it is one that needs to be looked into and there needs to be an in-depth study of the effects, both off and on the reservation, of the taxes that may be levied by the tribes in the future as well as those that have been levied in the past.

I will be happy to answer any questions that you might have, Senator.

[Prepared statement of Mr. Gage appears in the appendix.]

Senator **Melcher**. Del, is this Blackfeet 4-percent possessory tax being collected from the rural electrics right now?

Mr. GAGE. Last I talked with the rural electrics, Senator, they were not sure just what direction they were going to go, although their board of directors had authorized the manager of the company to take the issue as far as he needed to in order to get a determination as to whether they must pay both the State of Montana and its subdivisions and the tribal taxes.

Senator MELCHER. Well, had they paid the 4-percent tax to the Blackfeet?

Mr. GAGE. Not to my knowledge. That is not due until toward the end of the year, as I understand it.

Senator MELCHER. The tax that has been collected by the tribe on oil and gas production, is that similar to the 4-percent possessory tax or is it different?

Mr. GAGE. It is of the same nature as the State of Montana. It is a severance tax and a resource indemnity trust tax and a conservation tax.

Senator MELCHER. It is different than the 4 percent possessory tax then?

Mr. GAGE. Yes, sir.

Senator MELCHER. And I have forgotten, but has it been concluded whether the State of Montana collects any oil and gas revenue off of the Blackfeet Indian Reservation?

Mr. GAGE. Yes; they do.

Senator MELCHER. They have been?

Mr. GAGE. They have been in past years, yes.

Senator MELCHER. So, there is double taxation then in that sense.

Mr. GAGE. Yes, sir; they do not tax the tribal oil. However, that was just determined recently.

Senator MELCHER. They do not tax anything the tribe owns?

Mr. GAGE. Right.

Senator MELCHER. How about an individual member of the tribe? Do they tax anything an individual member of the tribe owns?

Mr. GAGE. I am not sure about that, Senator.

Senator MELCHER. All right. I don't think there is anything further in your testimony that I want to question you about at this time.

Senator Murkowski, do you have anything? Do you have an opening statement, first of all?

Senator MURKOWSKI. No; I think Chairman Inouye and yourself covered the area.

My question, Senator, is the concept of the objective which is to encourage employment on the reservations and the realization that unless there is an inducement, you are not going to obtain investment. The inability to forecast with certainty what the level of taxation will be, more often than not, is the single most significant thing in deterring a private sector investment on reservations.

I am curious to know, and I think Senator Melcher has asked the question, but perhaps I need a little further explanation—do I understand that the State of Montana can tax private sector investments on the reservation?

Mr. GAGE. Yes, sir.

Senator MURKOWSKI. As well as that private investment being taxed by the reservation?

Mr. GAGE. Yes, sir.

Senator MURKOWSKI. What would you suggest would be an appropriate way to resolve this double taxation and lack of certainty so that we can attract private investments on the reservation?

Mr. GAGE. Well, we tried in the last session of the legislature in Montana to get a bill through that would allow the State of Montana and its subdivisions to enter into cooperative agreements with tribes for the purpose of sharing tax revenues that both the tribe——

Senator MURKOWSKI. Sorry—to enter into joint agreement with the tribes to do what?

Mr. GAGE. To share tax revenues that may be assessed by both tribal governments and the State and its subdivisions so that they could come to an agreement on a level of tax and both would not have to go to the cost and expense of assessing and collecting the same tax if an agreement for the sharing of that tax revenue for whatever purposes were agreed upon. We do have a cooperative agreement in the State of Montana, an act whereby the tribes and the State and its subdivisions can enter into agreements, but there is no provision for the sharing of revenues in any of the State laws, and we needed that in order to move on with these cooperative efforts.

Senator MURKOWSKI. You needed that and you couldn't get it. Is that right?

Mr. GAGE. Could not get it, no.

Senator MURKOWSKI. And I assume that no one would be inclined to proceed and make an investment on a reservation knowing that he was subjected to an unknown tax liability. So, until something is done, I assume you are not going to get much in the way of investment. Grazing lands are another matter, but I am concerned specifically with the objective of trying to get investment.

Mr. GAGE. That is my contention, Senator. I don't think anyone will.

Senator MURKOWSKI. Is the answer for the State to just waive its taxing authority on reservation land? Would that be a reasonable alternative?

Mr. GAGE. I suppose it is an alternative, but it then places all of the tax load on the other areas of the State for those programs that the State offers to residents.

Senator MURKOWSKI. What is the State offering on a reservation that can be considered substantive?

Mr. GAGE. Well, they are not so much on reservation as county services, for instance, that are available to people whether they live on or off the reservations. All of the services of the State of Montana or its counties are available to people whether they live on or off reservations.

Senator MURKOWSKI. In your opinion, are the reservation councils willing to work with the State to provide assurance on long-term commitments regarding tax liabilities so that potential investors would have the insurance that they would know what their liability was for some out years?

Mr. GAGE. I am not sure about that, Senator, except to tell you that the coordinator of Indian affairs, Mr. Louis Clayborne, who works for the Governor's office supported us in our efforts to get this cooperative agreements bill through the legislature as did some of the tribes. The opposition came mostly from county commissioners.

Senator Murkowski. Thank you, Senator Gage.

Senator Melcher, I have no further questions. It would seem to me that there is a difficult problem out there and that the folks in Montana are going to have to figure out a way out. Otherwise, I am sure there will be a continued reluctance to subject oneself to an undetermined liability or a dual tax.

I wish you well.

Mr. Gage. Thank you, sir. It is a problem not just common to Montana. This is a problem common to States that have reservation situations.

Senator Murkowski. Well, I think from my vantage point, it is something that should and could be worked out between the States affected and the tribes. It appears to be under their jurisdiction. Maybe it is appropriate that we referee it. That seems to be about the extent of our involvement.

Thank you, Mr. Chairman.

Senator Melcher. Del, this Senate Indian Affairs Committee—how big a committee is it?

Mr. Gage. It is a four-member committee at the present, Senator Melcher. It used to be an eight-member committee, but with the financial constraints in the State, it has been cut down to a four-member committee and the budget down to the point where we are probably only going to be able to have three or four meetings during this interim.

Senator Melcher. Is it a legislative committee?

Mr. Gage. Yes, sir.

Senator Melcher. You do develop legislation?

Mr. Gage. Yes, sir.

Senator Melcher. And the legislation that was presented was not passed by either the Senate or the House?

Mr. Gage. No; that particular bill was not. It did pass the Senate but did not pass the House.

Senator Melcher. In serving on that committee, have you been in contact with similar bodies of the legislatures on other States?

Mr. Gage. Not directly other than just keeping track of what is happening in their various jurisdictions to see if there are things happening there.

Senator Melcher. Are there similar things happening? I don't know that anybody on this witness list can tell us. That is why I am asking you.

Mr. Gage. That I know of, not in the line of a cooperative agreement type of thing at least.

Senator Melcher. Do other States have reservations with similar taxes, the 4 percent possessory tax?

Mr. Gage. To my knowledge, yes, there are some who do have a possessory interest tax.

Senator Melcher. Very similar to the Blackfeet?

Mr. Gage. Yes, sir; I understand they are quite similar.

Senator Melcher. All right. Thank you very much, Del.

The next witness we have is William Covey of All Citizens Equal of Polson, Montana.

Mr. Covey, we welcome you to the Senate Select Committee on Indian Affairs, and you may proceed with your testimony in any manner you see fit.

STATEMENT OF WILLIAM COVEY, PRESIDENT, ALL CITIZENS EQUAL, POLSON, MT

Mr. Covey. Good morning, and thank you for the opportunity to make the following summary of my written statement on S. 1039.

I am Bill Covey, a resident of Big Arm, Montana which is located within the Flathead Reservation in western Montana. The reservation, about 1.25 million acres, is home for about 3,000 tribal members and 17,000 nontribal members. I am representing All Citizens Equal, a citizens group organized to reestablish and maintain the constitutional rights of non-tribal citizens who reside within the reservation.

I come today in general support of S. 1039 but with some suggestions for change.

To us, as citizens of this country, it is a paradox for this hearing to be held in the year of celebration of the bicentennial of our Constitution. The issue then was the same issue we discuss today, government without representation.

My comments on S. 1039 start with the counterproductivity of taxation. Taxation implementation by any government entity when there is no voter participation to provide the consent and constraint to tax has historically provided an unstable economic environment, turmoil, and dissent.

There are sufficient examples from tribal taxation already in Arizona, Washington, and Montana, to name three, that indicate tribal government taxation can be capricious and fearsome to nontribal and tribal businesses and individuals. In consideration of these examples, a prudent investor would invest somewhere else.

Already, hard examples of aborted investments are available on the Flathead Reservation due to other jurisdictional issues. Taxation will surely increase the number.

Most all tribal governments face essentially the same financial problems. The degree of need is the difference. So, having the right to tax where there is no wealth to tax, that is, no nontribal people or businesses, is certainly not equitable with tribes that have such a potential tax base. The result is making the rich better off and the poor no better off.

Taxation, in other words, is not a solution for the tribes that are not well off now. In fact, it would probably drive economic development, tribal or nontribal, away more quickly on poorer reservations, because the tax rate would tend to be more oppressive.

Tribal government taxation would also result in double taxation which is both unacceptable and repugnant in our country today. If this precedent is approved by Congress, it is logical to assume that State and local governments would continue to tax along with tribal governments and, indeed, they would have to in order to survive. The double taxation would almost surely remove most, if not all, nontribal businesses, large and small, from the reservations, and, consequently, tribal businesses would shoulder all of the burden.

It has been suggested that tribal governments should be allowed to tax if they provide the services local governments provide. We are totally opposed to such a suggestion. Our reason is, again, we do not have representation in the government in determining the services we need or do not need.

The idea of a 2-year moratorium on taxation is clearly a positive approach to this issue. We believe it is needed, and we also recommend it be extended until the completion of a suitable and comprehensive review of the impact of taxation on nontribal members and the economy of the reservations is accomplished.

We believe review and approval of proposed tax ordinances by the Secretary of the Interior would be ineffectual and amount to a rubber stamping of the proposal. The Secretary himself on several occasions has stated that he will, when any doubt exists on a subject concerning the tribes, make his decisions in their favor. We recommend by-passing his office.

Regarding authorization of $450 million for hardships on reservations and $75 million for health care, we are in agreement with the writers of the bill that financial assistance is probably needed in these subjects on some reservations. We cannot agree it should be allocated in conjunction with this bill, because it implies it is in lieu of taxes.

Our own reservation provides an example of our concern for this part of S. 1039. The Confederated Salish and Kootenai Tribes on the Flathead Reservation implemented a budget in 1987 that included $2.3 million for land purchases, $400,000 for legal services, and $5,000 for health care. The average annual budget for land purchases by these tribes is $500,000.

It must be kept in mind they already own about 600,000 acres and have an on-site population of but 3,000 people. Their lands contain much good farming and grazing land, highly desirable lake frontage, and developed land adjacent to highways and in towns.

Our question is, why should the taxpayers be paying even more money to those tribes which are not using their present financial resources in a manner that benefits their members?

We recommend that if this item is included in the bill that any tribe which receives money must agree to an audit of its entire budget by the General Accounting Office. The GAO reports should be made public.

If a Presidential commission is appointed, it must have a majority of nontribal members. Hopefully, if such a commission comes about, constitutional rights will be of paramount importance.

Finally, though we especially appreciate the efforts of you, Senator Melcher, and Senators Baucus and Simpson, regarding S. 1039, we believe it is only a band-aid to the problem. Tribal taxation can be manifested in many ways. One of our local tribal councilmen recently said we don't care if Melcher's bill does pass. We can still levy fees, permits, and licenses. They aren't taxes.

And he was correct.

I don't believe Congress is prepared to deal with a continual procession of citizens seeking redress through legislation because of exorbitant fees, unusual and unfair permits, and capricious licensing. I know nontribal members cannot afford to take each of those through the court system, and I do not think they should have to.

There is a solution for the dilemma. This bill could be amended to include the following two statements: "Tribal government jurisdiction and taxation of all and any type is limited to tribal members, their activities, tribal owned lands and trust lands, and activities on such lands." "Fee patent lands of all nontribal members are excluded from all types of tribal jurisdiction and taxation."

The inclusion of those statements would accomplish the following important objectives:

A healthy climate for economic development and growth would be immediately established on the private lands intermingled with tribal lands on reservations across the country. Such growth and development would provide employment for tribal members and would foster similar development on tribal lands, and the competition would tend to suppress oppressive taxation of tribal businesses by tribal governments.

The constitutional rights of nontribal members who own, work, or otherwise use fee patent lands on reservations would be reestablished. Congress would be fulfilling its responsibilities to its citizens, both Indian and non-Indian.

The whole subject of taxes, fees, permits, and licenses as they pertain to fee patent land would be resolved in an equitable fashion.

Thank you. I would be pleased to answer any questions you may have.

[Prepared statement of Mr. Covey appears in the appendix.]

Senator MELCHER. Mr. Covey, the Salish and Kootenai are not imposing any type of tax on non-Indians on the reservation. Is that right?

Mr. COVEY. That is correct.

Senator MELCHER. So, have you had any direct experience with such a situation as Senator Gage just outlined?

Mr. COVEY. You mean the possessory tax on the Blackfeet?

Senator MELCHER. Yes.

Mr. COVEY. No; I haven't had any personal experience. However, I have read a great deal about all of the other taxation processes.

I might add, Senator, our own reservation folks have said that at this time, they aren't interested in taxation, but my response to that is I don't know, from reading history since the days of Christ and the Roman Empire of any government which has had the ability to tax that hasn't taxed. So, I assume they will. It is just a question of time.

Senator MELCHER. This organization, All Citizens Equal—is the membership composed of people on the reservation?

Mr. COVEY. We have members from practically all of the western States, in fact, quite a few States around the United States and out of the country. The membership is open, of course, to any resident, user, sportsman, nonresident, whoever is interested, and we also include some tribal members in our membership.

Senator MELCHER. Is it a very large membership?

Mr. COVEY. Our membership right now is about 500 people. Our potential membership—we have recently sent out 7,000 letters of membership. We assume we will probably get back up to the original membership of our organization which was about 3,000. We are affiliated with national organizations of similar concern.

Senator **Melcher**. Like what?

Mr. **Covey**. Like PARR, Protect America's Rights and Resources; Total Equal Americans; Quinalt Property Owners Association; and so forth.

Senator **Melcher**. In other words, you think it is a national problem?

Mr. **Covey**. It certainly is, sir. The basic problem, Senator, in my view, is not an Indian/non-Indian problem. It is a Congressional problem which Congress has not addressed—the rights of those folks who live within reservations who are nontribal members. We live on fee patent land, land that was sold by the Federal Government—in fact, advertised to be sold. In my own personal case, my wife and I bought property not knowing in any way that this type of jurisdiction existed.

Even the Supreme Court has addressed the problem. We think Congress has got to get the problem resolved of those nonmembers.

Senator **Melcher**. Where do you live, Mr. Covey? In Polson?

Mr. **Covey**. Just north of Big Arm on Flathead Lake.

Senator **Melcher**. All right. Thank you very much.

Our next witness on the list is a representative of the National Association of Counties. I am informed this morning that they do not have a witness here, and they would like to submit a statement for the record. So, we will make that statement part of the record.

[Prepared statement by the National Association of Counties appears in the appendix.]

[Material to be supplied appears in the appendix.]

Senator **Melcher**. We will go on to the witnesses following that, representatives from the Assiniboine and Sioux Indian Community at Fort Peck. Please identify yourselves.

Mr. **Eder**. I am Ray K. Eder. I am a member of the Fort Peck Assiniboine and Sioux Tribes and a tribal council member for the executive board.

Senator **Melcher**. Are you accompanied by anyone else?

Mr. **Eder**. I am going to be assisted by my tax administrator, Mr. Lawrence Wetsit, and also our legal counsel, Mr. Reid Chambers.

Senator **Melcher**. Do you have prepared testimony?

Mr. **Eder**. Yes, sir.

Senator **Melcher**. We would like to have a copy of that, and you may proceed.

STATEMENT OF RAY K. EDER, MEMBER, FORT PECK TRIBAL EXECUTIVE BOARD, ACCOMPANIED BY LAWRENCE WETSIT, TRIBAL TAX ADMINISTRATOR; AND REID CHAMBERS, LEGAL COUNSEL

Mr. **Eder**. Mr. Chairman, I am Ray Eder of Poplar, MT and a member of the Fort Peck Tribal Executive Board.

The Assiniboine and Sioux Tribes of the Fort Peck Reservation strongly oppose S. 1039. The bill throttles the powers of Indian tribes to operate as governments, although our inherent sovereign right to impose taxes has been solidly established by Supreme Court decisions.

S. 1039 would overrule these Supreme Court holdings.

I am assuming that the Senate committee is aware of the landmark Supreme Court decisions of *Merrion* v. *Jicarilla Apache Tribe* and *Kerr-McGee Corporation* v. *the Navajo Nation.*

Supporters of the bill pretend that its enactment further the United States trust responsibility. If this bill in fact furthered the trust responsibility, tribes would not be uniformly resisting it.

Modern Indian tribes are not foolish or stupid. They do not need more information before they exercise important governmental powers. Tribes know economic conditions on their reservations. They are not going to enact taxes that discourage economic activity.

S. 1039 seeks to reimpose paternalistic Federal control on tribes, reversing the positive trend of several decades of legislation freeing tribes from restrictive bureaucratic authority. Far from expressing the Federal trust responsibility to benefit Indians, the bill's real intent is to protect from tribal taxation a handful of non-Indian companies which have for years reaped profits from the use of Indian lands without contributing 1 cent in tax dollars to the tribal governments which must provide services to reservation people.

Mr. Chairman, I would like to describe the circumstances that led to enactment of taxes at our reservation, because they illustrate the correctness of these statements.

Five years ago, after the courts clearly confirmed tribal taxing power, the Assiniboine and Sioux Tribes of the Fort Peck Reservation enacted a 2-percent severance tax on the value of oil and gas produced on trust lands within the Fort Peck Reservation.

This past year, we faced a very substantial shortfall or deficit in our tribal budget—in the neighborhood of $3 million for the 1987 fiscal year. This was caused by the decline in Federal grants and tribal mineral leasing revenues in recent years, problems that will continue in the years ahead.

The tribes met this problem by reducing our budget by approximately $2 million. To do this, the tribes instituted a hiring and salary freeze and issued an expenditure moratorium. The tribes also substantially reduced expenditures for law enforcement, foster care, nutritional and other care for the elderly, and education. We have dropped entire programs from our budget, including tribal land purchases and per capita payments to tribal members which were made from oil and gas revenues.

At the same time, the tribes decided to consider increasing the severance tax rate to 7 percent and to consider a 3 percent tax on the value of all utility property on trust lands within the reservation. The tribes conducted a careful study of the economic impact of each proposal both in terms of revenues received and whether the total level of taxation would diminish economic activity on the reservation. Then our tribal executive board scheduled and gave notice of a public hearing on each proposal, inviting public comment and testimony. Copies of the draft tax ordinances were made available to all the public.

Although no companies chose to testify on the severance tax increase, the board heard testimony from seven witnesses at the utility tax hearing: five potential taxpayers, a county commissioner of one of the counties where our reservation is located, and one tribal member. All testimony was recorded, and most witnesses submitted written comments as well.

A number of small nonprofit rural cooperative associations providing electrical and telephone services on the reservation testified that the utility property tax rate was unreasonably high as to them and was, in fact, considerably higher than taxes imposed by the State and would substantially injure their businesses by increasing the cost of their services.

When the tribal executive board enacted the utility property tax ordinance, it decided to make two basic changes in the draft ordinance after considering testimony presented at the hearing. First, the board reduced the tax rate for nonprofit cooperative rural electrical and cooperative rural telephone associations from 3 percent to 1 percent. Second, it exempted from taxation any company owning utility property on trust lands on the reservation with a total value of less than $200,000.

These two taxes are only imposed on activities on trust lands—I might stress trust lands. No deeded lands are taxed. Careful study an public hearings preceded enactment of the taxes. The tax rates are equivalent to those imposed by the State of Montana, and, indeed, the utility tax values property as assessed by the State.

The tribes have done everything in a fair manner. An independent tribal tax commission is created to hear all administrative appeals on these taxes. Its three members serve for fixed terms, receive compensation at a rate that may not be altered during their terms of office, may be removed only under the procedures and standards provided in the tribes' code of justice for removal of tribal judges, and must disqualify themselves in any proceeding in which their impartiality might reasonably be questioned.

Whenever an appeal is made, the commission is required to schedule a hearing, giving the applicant notice. At this hearing, the taxpayer has the right to present oral and written testimony of witnesses under oath and to be represented by counsel. The commission may take evidence under oath and issue subpoenas to compel the attendance of witnesses or for the production of books, records, documents, and other evidence. Its decisions may be appealed to the Fort Peck Court of Appeals.

Mr. Chairman, we believe that the circumstances on our reservation are typical of other reservations in Montana and across the country. In the usual situation, tribes only tax activities on trust lands. Normally, taxes are paid by businesses, not individuals.

The taxes are not discriminatory in that all businesses of whatever type involved pay the tax. The taxes are set at rates that are comparable to those set by other governments. This shows that the Indian tribes are not driving businesses off reservations any more than are other governments. They are merely insisting that all businesses pay their fair share of taxes to defray the cost of providing governmental services by the tribes.

It is clear that Indian tribal governments today are providing far more services than was the case 10 or 20 years ago. This is both because tribes are operating as governments and because, given the large cutback in Federal services to reservations in the present decade, Indian tribes have moved increasingly into filling this void.

The Assiniboine and Sioux Tribes support health and sanitation, law enforcement, fire protection, education, transportation, and other government programs on the reservation. For example, the tribes operate a renal care program. The rate of diabetes—and, thus, the demand for dialysis—has risen sharply in recent years. If the tribes were not able to provide this renal care, the dialysis patients would have to be transported such great distances that treatment would not be feasible in some cases.

The tribes also provide alcoholic treatment, nutritional and other care for the elderly, and disaster assistance programs. In the education area, the tribes fund and operate a community college and NAES College which is a 4-year satellite campus offering a B.A. degree. We operate a foster home for children in need and support a halfway house and a primary residential treatment center.

We have for years been operating these programs with our own tribal monies, supplementing available Federal funds.

Without the taxes we have enacted, the Assiniboine and Sioux Tribes could not provide many of these vital governmental services. Even with the taxes, we are able to operate only a bare bones budget, below that of previous years.

It is said by some that tribal taxation is "double taxation" on top of taxes paid to State and county authorities. This point was made by some witnesses at the hearings before our tribal executive board on our tribal tax program.

This contention has already been addressed and answered by the Supreme Court of the United States. In its decision in the Merrion case, the Court stated that "the mere existence of State authority to tax does not deprive the Indian tribe of its power to tax." The Court made it clear that "when the activity taxed by the tribe occurs entirely on tribal lands, multiple taxation issue would arise only if a State attempted to levy a tax on the same activity which is more than the State's contact with the activity would justify."

In other words, if double taxation is involved, the Supreme Court has already concluded that it is the State tax which should yield to the tribal tax.

If legislation is necessary, it is the State taxes that should be restricted. For years, States have been taxing activities on trust lands. They have no business doing this. States provide limited services on trust lands. Recent court decisions have questioned the authority of States to tax non-Indian businesses entering reservations to do business with Indians.

Some supporters of the bill say tribes are engaged in "taxation without representation." However, the Supreme Court has repeatedly held that the fact that non-Indians who choose to be on a reservation "could not become members of the tribe and, therefore, could not participate in tribal government, does not alter our conclusion" that the tribes have authority over their activities.

Tribes are no different from any government. Here in Washington, DC, I cannot eat, sleep, or drink without taxes. We have no say over taxes, levies, or tolls when we choose to visit or do business here. We become subject to all laws, rules, taxes, or any other act of the presiding jurisdiction, foreign or otherwise. If tribal members do not like this, we must either leave Washington, DC or live with it.

Before closing this testimony, we also wish to comment on the portion of S. 1039 which would authorize $525 million in Federal funds for various Indian programs. This promise of money is an illusion, for as we understand S. 1039, it authorizes but does not appropriate the funds promised. In the Snyder Act and other legislation, Congress has already authorized unlimited funding for Indian programs. No additional authorizing legislation is necessary.

Appropriations would be needed to make the promised funds a reality, and we have no guarantee that the Appropriations Committees, Congress, or the Administration would allow such expenditures with a large deficit facing Congress and the country.

Absent appropriation of funds, there is absolutely no benefit to Indian tribes from S. 1039 that could even begin to offset its enormous harm of foisting paternalistic control over tribes and frustrating tribal self-determination and governmental authority. Since there is no benefit to Indians from this legislation, it should not be enacted. Indeed, we question its constitutional validity.

A number of recent cases have held that "legislative judgments will not be disturbed" as long as the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." But this bill cannot meet this test—it is not tied rationally to Congress' vital trust responsibility.

Mr. Chairman, I would like to thank you for the opportunity to appear before the committee and present this testimony. We would be happy to answer any questions the committee may have.

[Prepared statement of Mr. Eder appears in the appendix.]

Senator MELCHER. Ray, what is the disposition of the present Fort Peck tax? Who is it imposed on?

Mr. EDER. Mostly utility companies that are operating on our reservation, sir.

Senator MELCHER. Only utility companies?

Mr. EDER. Right now, just utilities.

Senator MELCHER. Utilities.

Mr. EDER. And the oil and gas severance tax. That is separate.

Senator MELCHER. You have oil and gas severance tax and a tax on utilities which is the rural electrics and MDU, Montana-Dakota Utilities?

Mr. EDER. MDU's company is split into two parts. I think Mr. Wetsit could better explain that. They have done the research on that, but they do not pay the tax.

Senator MELCHER. Lawrence, go ahead.

Mr. WETSIT. Senator, on Fort Peck, the only companies that are paying any taxes are the rural electrics which are paying 1 percent. Of the eight or nine rural electrics that we have on Fort Peck, only three of the companies are subject to the tax, and it is a very small amount of tax that they pay.

Senator MELCHER. And rural telephones?

Mr. WETSIT. Rural telephones also.

Senator MELCHER. And MDU?

Mr. WETSIT. MDU is exempt from the tax. They fall under the $200,000 limit.

Senator MELCHER. I see. Is that all, then, at Fort Peck?

Mr. WETSIT. One major pipeline, a natural gas pipeline and also all oil and gas companies operating and producing oil on trust property pay tax.

Senator MELCHER. Is the oil and gas companies' based on severance?

Mr. WETSIT. Yes; based on severance.

Senator MELCHER. But the pipeline is not?

Mr. WETSIT. No, the pipeline is based on value of the property.

Senator MELCHER. Any tax on transportation?

Mr. WETSIT. No tax on transportation.

Senator MELCHER. Did you propose a tax on Burlington Northern?

Mr. WETSIT. Yes; we have proposed a tax on Burlington Northern, as you may be aware. That is in Federal court.

Senator MELCHER. And what kind of tax is that?

Mr. WETSIT. It is a tax on the value of their property on trust property in Fort Peck.

Senator MELCHER. And that is in court but not the pipeline tax. That is not in court?

Mr. WETSIT. No; the pipeline is not in court.

Senator MELCHER. So, the people that are affected by it include the rural electric customers, and that is 1 percent of what?

Mr. WETSIT. It is 1 percent of their total value on trust property.

Senator MELCHER. And the assessment is based on what?

Mr. WETSIT. We use the State's assessed value for their property.

Senator MELCHER. Now, in effect, what does that tax collect, the 1 percent?

Mr. WETSIT. From the rural electrics, we collect from three companies about $6,000.

Senator MELCHER. And what would you collect from the pipeline? Has it paid?

Mr. WETSIT. Yes; the pipeline has been paid.

Senator MELCHER. Has not or has?

Mr. WETSIT. They have paid.

Senator MELCHER. And how much is that per year?

Mr. WETSIT. The pipeline pays about $1.1 million.

Senator MELCHER. And they have paid it?

Mr. WETSIT. Yes; they have paid.

Senator MELCHER. Now, we have that $1 million that the pipeline pays which would become part of their operating costs and, of course, would be spread over a great variety of people off the reservation and out of the State of Montana, all over the country. The $6,000 is paid by the rural electrics and is spread evenly over the people who use those rural electrics both on and off the reservation, I assume. Some of those rural electrics are off the reservation, aren't they? They are both on and off, are they not?

Mr. WETSIT. Yes; they are.

Senator MELCHER. And Indians and non-Indians would pay it alike. Right?

Mr. WETSIT. Yes; we do.

Senator MELCHER. And what did you first propose that they pay?

Mr. WETSIT. We first proposed that they pay the tax at a 3 percent rate.

Senator **Melcher**. That was 3 percent based on the same valuation?

Mr. **Wetsit**. Yes.

Senator **Melcher**. So, what you first proposed was $18,000 per year to be collected, and you reduced it to $6,000.

Mr. **Wetsit**. Yes, we did.

Senator **Melcher**. And $6,000 in tax revenue won't do very much for the tribe, will it?

Mr. **Wetsit**. No; it doesn't.

Senator **Melcher**. It pays for collecting it and leaves a slight portion of that available for general uses on the reservation.

Mr. **Wetsit**. Yes.

Senator **Melcher**. Whereas if you didn't have that pipeline going through there, there wouldn't be much sense in the present taxation would there?

Mr. **Wetsit**. With the exception of Burlington Northern, no, there would not be.

Senator **Melcher**. And what would you collect out of Burlington if the court case were settled entirely in your favor?

Mr. **Wetsit**. About $619,000 per year.

Senator **Melcher**. So, the Fort Peck Tribes would like to collect $619,000 out of the Burlington Northern and may succeed in court or may not. The pipeline affords the opportunity to spread $1.1 million annually across a broad number of people living off the reservation, but not too many tribes have a major—what is that, a 42-inch pipeline?

Mr. **Wetsit**. Yes; it is.

Senator **Melcher**. Not too many tribes have a huge pipeline crossing their reservation.

I am glad to hear you say what you do about the Snyder Act, Ray. I only wish that the contentment you seem to conclude in your testimony reflected some adequate funding going to the Fort Peck tribes under the Snyder Act.

Mr. **Eder**. My understanding of the Snyder Act, sir, is that there is——

Senator **Melcher**. You said it is unlimited.

Mr. **Eder**. No; I didn't say it was unlimited.

Senator **Melcher**. What were your words?

Mr. **Eder**. I said it was made by Congress.

Senator **Melcher**. You said unlimited funding.

Mr. **Eder**. Yes; Our statement here was it authorizes but does not appropriate the funds promised. That is under S. 1039. In the Snyder Act and other legislation, Congress has already authorized unlimited funding for Indian programs.

Senator **Melcher**. That sounds good.

Mr. **Eder**. But no additional authorizing legislation is necessary.

Senator **Melcher**. Unlimited funding sounds good.

Mr. **Eder**. But the thing about it is since the Reagan Administration, as I see it, has been in office, and with all the deficits that they are proclaiming, the cuts here and there, and, as you are probably aware, Dr. Rhodes himself on Indian services to the people is going to cut something like $72 million.

In your S. 1039, you are proposing $75 million for Indian health care. You might be aware that there are over 1 million Indians in the United States. If you divide that on a per capita head for treatment, that would be $75. I couldn't even get a good physical for that or an operation or whatever.

Senator **Melcher**. No, but $75 per capita would make up $300 per family of four, and that added to what Congress otherwise appropriates would be significant.

I don't think you are attempting to tell me or tell anybody that there is adequate funding for Indian education, Indian health, or Indian economic opportunity on the reservation, but throwing out gratuitous remarks in your testimony doesn't help, either.

On the question of other court cases, Congress hasn't acted on this, has it?

Mr. **Eder**. Which cases?

Senator **Melcher**. In other words, you first proposed a 3 percent tax that the utility companies would pay, and under the limitations you had or exemptions you had, MDU doesn't count, so it is the rural electrics and rural telephone groups that are subject to the tax. Then, you lowered that to 1 percent.

Is there anything in these court cases that would say that the tribe couldn't impose higher taxes? You cite the court cases, right?

Mr. **Eder**. Well, I think the amount of tax that you are going to impose depends on the needs of government, sir.

Senator **Melcher**. And the needs are pretty great.

Mr. **Eder**. Well, in some areas. I am not an economist, and I can't project what they are going to be next year.

Senator **Melcher**. Well, you have legal advice there sitting next to you.

Mr. **Eder**. Yes.

Senator **Melcher**. Did your legal advice state that the court established a limitation?

Mr. **Eder**. No; I think that most taxing agencies tax within the limits of their ability to tax.

Senator **Melcher**. Ask your attorney. Maybe he would like to respond to that. Does the court establish a limitation?

Mr. **Chambers**. Senator, the court has not established limitations. I think the limitations are really set by the economic conditions on the reservations, and I think at least——

Senator **Melcher**. Well, Mr. Chambers, you are not going to tell me that the $6,000 plus the $1.1 million is going to make the economic situation adequate, are you?

Mr. **Chambers**. Senator, no. In fact, the Fort Peck tribes had to cut their budget by $3 million, and the taxes only bring back a third of that.

Senator **Melcher**. So, the answer to the question, then, is that the courts have not established any limitation.

Mr. **Chambers**. They have not, Senator.

Senator **Melcher**. It is obvious Congress hasn't acted in this area.

Mr. **Chambers**. No; Congress hasn't, Senator, but the courts have, every time the cases have come up, affirmed tribes' governmental authority to impose these taxes.

Senator **Melcher**. Absent any action by Congress.

Mr. **Chambers**. That is correct, Senator. We hope Congress won't take action to limit tribal authority here.

Senator **Melcher**. You are not trying to frame this testimony to say that courts in any way have said that Congress lacks the authority, to set tax limitation, are you, counselor?

Mr. **Chambers**. Senator, we are not, although the courts have said that when Congress acts in Indian affairs, the action must be tied rationally to the trust responsibility.

Senator **Melcher**. Precisely.

Thank you very much, and thank you, Ray, and thank you, Lawrence, for being here.

Mr. **Eder**. Thank you, Senator.

Senator **Melcher**. I think we will just proceed with the tribal witnesses. Although Mr. Ryan is here now, let's hear from Wes Martel, Co-Chairman of the Shoshone Business Council from the Wind River Reservation in Wyoming.

STATEMENT OF HON. WES MARTEL, COCHAIRMAN, SHOSHONE BUSINESS COUNCIL, WIND RIVER RESERVATION, WY; ACCOMPANIED BY ORVILLE ST. CLAIR

Mr. **Martel**. Good morning, Senator. I appreciate the opportunity to speak in front of the committee here this morning.

My name is Wes Martel, and I am a member of the Wind River Tax Commission and the Shoshone Business Council, the legislative body of the Shoshone Indian Tribe of the Wind River Reservation. With me today is Mr. Orville St. Clair who is also a member of the Wind River Tax Commission and the Shoshone Business Council, and we have our legal counsel in the room here somewhere.

Mr. Chairman, we are here in opposition to the enactment of S. 1039, as we believe that the bill would change existing law regarding the power of tribes to tax non-Indians in Indian country and would impose tension in what now is a very positive relationship between the Shoshone Tribe and the non-Indian taxpayers on the Wind River Reservation.

Importantly, all of this would occur at a time in which a severe State and local government service shortfall exists for the non-Indian and Indian taxpayers on the Wind River Reservation which gap the Shoshone and Arapahoe tribal governments are endeavoring to fill. To offer the needed increased tribal governmental services, however, the ability of the Shoshone Tribe, like every other sovereign, to enact sound tax programs applicable to all reservation residents is critical.

The proposed bill would destroy that ability. In addition, imposing Bureau of Indian Affairs review and approval of tribal governments' taxes not only compromises almost 200 years of tribal sovereignty but also allows participation in tribal tax efforts by an entity without special expertise in taxation and which should not be substituted for tribal governments as the legislating entity for tax matters on Indian reservations.

Finally, the proposed bill realistically does not provide any funding alternatives in light of the current Gramm-Rudman climate, thereby interrupting the flow of services both to Indian and non-Indian reservation residents.

We would like now to address our objections in more detail.

The United States Supreme Court has made clear that tribes have the power to tax both Indians and non-Indians within tribal territory. The Supreme Court also has held that Federal law does not require the Secretary of the Interior to review and approve tribal taxation ordinances.

State powers of taxation in tribal territory, by contrast, are limited. The Supreme Court has held that States may not tax Indians in Indian country and may tax non-Indians only in those rare instances where very strong State interests are at stake or substantial State services are delivered to the non-Indian taxpayers.

S. 1039 radically would alter this balance by placing a moratorium on new tribal taxes applicable to non-Indians and requiring submission of all tribal taxes to the BIA for review and approval. S. 1039 also would run directly against established Federal Indian policy favoring the strengthening of tribal governments and would have the effect of displacing important services not only to Indians but also to non-Indians.

Mr. Chairman, non-Indian taxpayers enjoy productive relationships with the Shoshone and Arapahoe Indian Tribes of the Wind River Reservation. As an example, recently, the City of Riverton, populated predominantly by non-Indians and located entirely within the reservation, sought to annex adjacent areas also populated predominantly by non-Indians. These non-Indians unanimously opposed the annexation, preferring instead to continue their exclusive relationship with the Wind River Tribes.

The Wind River Tribes, consistent with the trust placed in them by these non-Indian taxpayers, provide essential governmental services both to Indian and non-Indian taxpayers on their reservation. Such services include regulation of the public health and welfare, administration of a tribal court system, and road building and servicing.

The efforts by the Wind River Tribes to offer improved and expanded governmental services to reservation residents, however, are hampered by burdensome State taxation which inhibits the ability of the tribes to tax and does not ensure the services critically needed by the non-Indian taxpayers. The law is quite clear that the State of Wyoming and its political subdivisions may not tax Indians on the Wind River Reservation. The only possible State tax base, therefore, is that associated with non-Indian activity, in particular, lessees' production of oil and gas from Indian-owned lands.

In return for an estimated $50 million in collections of State severance taxes from the reservation from 1969 to 1983, however, Wyoming has offered virtually no services. Similarly, Wyoming State political subdivisions appear to be providing few, if any, services to non-Indian taxpayers in return for approximately $51 million of ad valorem taxes collected from such taxpayers.

Even assuming the primary services being delivered include roads and education, the Indians served on the Wind River Reservation generate substantial Federal funding under the Impact Aid laws. This funding supplants the need for State contributions for education. Moreover, no evidence exists that State education contributions even benefit the non-Indian oil and gas operators who pay the taxes.

In these circumstances, the Wind River Tribes are primarily responsible to provide the important governmental services needed on the Wind River Reservation by both Indian and non-Indian taxpayers.

To enable them to do so, in 1979, the Joint Business Council of the Shoshone and Arapahoe Tribes enacted a tax on the value of oil and gas production at Wind River at a rate of .5 percent. At that time, the combined State and local tax rates were approximately 12.25 percent. Subsequently, the Joint Business Council raised its tax rate to 4 percent to enable the tribes to offer increased tribal governmental services to reservation residents. Today, the tribes are providing many services both to Indian and non-Indian residents.

Importantly, in enacting our tax and its accompanying regulations, the Joint Business Council accorded reservation residents many opportunities to participate in shaping the law and regulations. The tribes, through the Wind River Tax Commission, proposed regulations for the tax which provide detailed administrative procedures for payment and challenges of the tax assessments.

The proposed regulations were subject to an extended written comment period and a public hearing. The tribes will be submitting for the record of this hearing the final regulations which the Wind River Tax Commission soon will adopt.

Those regulations set forth in a preamble the taxpayer comments that were received, primarily from non-Indian taxpayers, and the Tax Commission's responses. Many comments resulted in modifications to the regulations. The process followed by the tribes in adopting tax regulations is just one example of the prevailing practice in Indian country of strict adherence to the due process and equal protection rights of all reservation residents.

The single most difficult problem the Wind River tribes face in their taxation efforts is the layering of State and local taxation upon tribal taxes on the non-Indian taxpayers. And, as noted earlier, experience shows the State and local governments profit enormously from their taxes because they offer very little in return.

These extra burdens, moreover, result in higher total taxes being imposed on reservation residents than on non-reservation residents. As a direct result, business activity on the Wind River Reservation is dampened, thereby reducing tribal income, employment for all residents, and the tax base available to provide the revenues for essential governmental services for all reservation residents.

To protect their own ability to impose reasonable taxes for valuable tribal governmental services and to ensure that non-Indian taxpayers are not unfairly burdened merely because of their presence on the reservation, the Wind River Tribes are contemplating several solutions. A solution will be selected only after careful study of the State and local taxes, the State and local services delivered, and the applicable laws.

We urge Congress to let this process run its course. We fear that premature legislation simply cannot address the unique circumstances at Wind River in a fair and equitable manner.

Moreover, we believe it important that local governments seek to work out appropriate intergovernmental relationships which may never develop if Congress steps in at this time.

We thank the Congress, however, for its interest in the concerns of our non-Indian taxpayers and urge Congress to give its sanction to the efforts of the tribes to impose reasonable taxes for services delivered to on-reservation residents and to address the problem of burdensome State and local taxation of the non-Indian reservation residents.

Again, I thank you for your time. I would be happy to answer any questions that you may have, Senator.

[Prepared statement of Mr. Martel appears in the appendix.]

Senator MELCHER. Wes, has the Joint Business Council only established a tax on oil and gas production?

Mr. MARTEL. The 4-percent severance tax, Senator, is a severance tax on oil and gas production.

Senator MELCHER. Has the Joint Business Council established other taxes?

Mr. MARTEL. At this time, we have raised the amount of our taxes to the level of the State and county taxes which are applicable to the reservation. However, we are not collecting those taxes. We are giving the taxpayers credit for the amount of taxes that they are paying to the State and the County of Freemont at this time.

Senator MELCHER. Credit on what?

Mr. MARTEL. The ad valorem taxes that they are paying to Freemont County and the 6-percent severance tax that they are paying to the State of Wyoming.

Senator MELCHER. Yes, but credit against what?

Mr. MARTEL. Against their taxes.

Senator MELCHER. Against just oil and gas production or what?

Mr. MARTEL. Right, and ad valorem taxes, Senator, is on real and personal property located in Freemont County. We have raised our tax to the 4 percent that the tribes have, the 6-percent severance tax that the State of Wyoming has, and the 6-plus percent of ad valorem tax that goes to Freemont County. So, our tax is in excess of 16.25 percent, but at this time, we are only collecting 4 percent. We are giving those taxpayers a credit for the amount of taxes that they are paying to Wyoming and Freemont County.

Senator MELCHER. Which includes ad valorem tax on property other than oil and gas.

Mr. MARTEL. Right.

Senator MELCHER. All property.

Mr. MARTEL. Real and personal property, correct.

Senator MELCHER. How much does that amount to total?

Mr. MARTEL. Well, with the decline in oil and gas prices, before the heavy fall, it was about $6 million a year. I imagine that is between $3 and $4 million a year for severance taxes alone. In Wyoming, the 6 percent that the oil and gas companies pay to the State of Wyoming on the market value of their production, they pay that same 6 percent to Freemont County plus the real and personal property that they have such as pump jacks, heater treaters, lack meters, all the equipment that they use in their field operations.

That amount probably a year ago when it was still good was between $12 and $15 million a year. Now, it is probably between $6 and $8 million.

Senator MELCHER. How many nontribal members actually reside on the reservation?

Mr. MARTEL. I would say 10,000 would be a good ball park figure.

Senator MELCHER. So, if you are a nontribal member and you, for instance, build a new barn, would you apply the ad valorem tax to that also?

Mr. MARTEL. Yes; but as I said, we are not collecting any of that tax at this time. You are still paying to Freemont County for that barn.

Senator MELCHER. You don't collect the tax on that.

Mr. MARTEL. No.

Senator MELCHER. So, what you are collecting taxes on is the——

Mr. MARTEL. It is the 4-percent severance tribal tax.

Senator MELCHER. Do you plan on beginning to collect the additional tax on property other than oil and gas?

Mr. MARTEL. Ad valorem, yes, on real and personal property.

Senator MELCHER. When do you plan to do that?

Mr. MARTEL. Well, we have been talking with the Governor of Wyoming. We have been talking with the county commissioners, and we are just seeing what their responses are going to be, and we are just going to see when that time is going to be. We don't have a specific date at this time.

Senator MELCHER. And you had, besides just talking to the Governor and others, public meetings on it?

Mr. MARTEL. Correct. We had a CFR Court, if you are familiar with the Court of Indian Offenses that is in place on some reservations. We converted that to a tribal court to allow for the civil jurisdiction to be extended to non-Indians as well and also to allow them to have a forum and a place to contest any decisions against their taxation.

Senator MELCHER. Within the tribal court system.

Mr. MARTEL. Right.

Senator MELCHER. Thank you very much, Wes.

Mr. MARTEL. Thank you, Senator.

Senator MELCHER. We will next hear from Mr. Edward Paisano, a tax administrator from Sandia Pueblo in Bernalillo, New Mexico.

STATEMENT OF EDWARD PAISANO, TAX ADMINISTRATOR, SANDIA PUEBLO, BERNALILLO, NM

Mr. PAISANO. Good morning, Mr. Chairman.

My name is Edward Paisano. I am from Sandia Pueblo, New Mexico, and I thank you for allowing us to make our comments on S. 1039. I believe all of the statements that have been made to you, Mr. Chairman, I will not want to reiterate again, but what I would like to do is briefly make comments on how the tribe Sandia has worked on their tax ordinance.

There is, I guess, room or the taxpayer is able to come in and discuss their tax rate and how it is evaluated with the tribe. We do have that process in place, so each taxpayer does comment on the tax rate itself and sits down with the tax administration to evaluate their tax and how the tax is being imposed on the taxpayer.

We currently have a severance tax, a possessory tax, and a gross receipts tax in place. The possessory tax has been collected in the amount of $225,000. The other two taxes are currently being evaluated at this time.

We feel that the current proposed bill will not help the tribe, because the tribe has given that authority already by the court system. We feel that because of the funding cuts within the government, the tribes are at this time able to generate revenues to take care of some of the programs and services that are needed on the reservation.

The services that we currently are making available to the non-Indian and also the Indian are police protection and fire protection on the reservation.

We are currently having non-Indian taxpayers that are protesting to the State of New Mexico and not paying any severance tax or gross receipts at this time, because they felt that this is double taxation and they were not receiving any benefits from the State at this time. According to the constitution of New Mexico, they voted not to assert any jurisdiction on the reservation, but they are currently taxing non-Indian on the reservation, and this, I believe, is why the taxpayers are protesting. They are not receiving the services that they want as far as protection. For the severance tax that is being imposed on the non-Indian, they felt that a road system or these types of services are needed, and they are not being received from the State.

We also feel that because of the slim budget within Congress, we don't think the monies that are being proposed right now are going to be available to the tribes. So, the moratorium would not assist. I think it would hinder a lot of the programs that are currently on the reservation.

As I stated, I don't want to reiterate what has been stated. The Pueblos right now are currently forming a committee or have formed a committee to address the tax issues that some of the Pueblos have not adopted yet so that we can assist these pueblos in helping them develop their tax codes on their own reservations.

There are different needs. The population makes a determination of what is needed on the tax rate on the pueblos, and this is the reason we felt that there should be a uniform code system within New Mexico.

One Apache Tribe has also agreed to sit on this committee so that the New Mexico tribes can jointly look at the issue at hand and see how they can solve this problem of getting these services to the non-Indians and to the Indians that live or have businesses on the reservation.

I want to quote the Assistant Secretary, Ross Swimmer. He made a statement that, "We at the Federal level have consistently talked about self-sufficiency, self-determination, and the need for tribes to develop businesses and to develop wealth on the reservations that can be converted into necessary things for individuals living on that reservation. It would be difficult for us to tell tribes it is fine to be self-supporting but stop short of levying any taxes because most governments tax revenue to support themselves."

I think the administration has also made that statement that the tribes should be self-sufficient, and what better way to do this than to start exerting their authority in this form as they are doing now in taxing the different businesses and entities on the reservation.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Paisano appears in the appendix.]

Senator MELCHER. Thank you very much, Edward. I think your testimony is good. It just starts to kind of peter out when you start to quote Ross Swimmer, but you didn't even do that until the last concluding paragraphs.

How much tax is the Pueblo of Sandia collecting right now?

Mr. PAISANO. How much?

Senator MELCHER. In dollars.

Mr. PAISANO. Approximately $225,000 at this time in possessory tax.

Senator MELCHER. Is that 3 or 4 percent or what?

Mr. PAISANO. That is 4 percent.

Senator MELCHER. And how do you arrive at the assessment in your case?

Mr. PAISANO. The assessment is derived from the property that the utilities are on on the reservation.

Senator MELCHER. But who assesses them?

Mr. PAISANO. The tribe does. We have pretty much used the basic concept that the State has used.

Senator MELCHER. You patterned it after the State of New Mexico?

Mr. PAISANO. Yes, Mr. Chairman.

Senator MELCHER. How many members of the Pueblo are there?

Mr. PAISANO. At Sandia, there are 370 members, and the biggest Pueblo, I believe, is about 9,000 or more.

Senator MELCHER. Which one is that?

Mr. PAISANO. I believe it is San Domingo.

Senator MELCHER. Is your experience on Sandia typical of the other pueblos?

Mr. PAISANO. Yes; that is the reason we are currently forming a committee with all the pueblos and one Apache Tribe, and that is the Jicarilla Tribe.

Senator MELCHER. And in all cases, you do this through hearings and discussions. Is that correct?

Mr. PAISANO. Yes, Mr. Chairman.

Senator MELCHER. All right. Thank you very much, Edward.

Mr. PAISANO. Thank you, Mr. Chairman.

Senator MELCHER. The last witness we have representing a tribe is Earl Old Person, Chairman of the Blackfeet Tribe.

I guess Earl will be back in a little bit.

Ross Cannon is here now. I had said earlier that he was trapped by the snow.

I have already requested that your statement be a part of the record, Ross. Do you wish to elaborate on any of it?

Mr. CANNON. Mr. Chairman, I didn't know when I was trapped in Minneapolis whether your office had distributed my telex copy of that statement, but if not, I have given your staff there some more copies.

Senator MELCHER. We had one copy of it, Ross.

Mr. CANNON. Well, I left a pile of them, and I have more if need be.

STATEMENT OF ROSS CANNON, EAST SLOPE TAXPAYERS ASSOCIATION

Mr. CANNON. Mr. Chairman and members of the committee, my name is Ross Cannon. I am an attorney in practice in Helena, Montana, and I represent the East Slope Taxpayers Association which is composed largely of people who live and work on the Blackfeet Indian Reservation or live in the communities adjacent to it and, in some cases, in the counties adjacent to it.

I won't read my statement, but I would like to reiterate some of the main points that I address in the statement.

The first one is that, as we have heard and you have heard, I am sure, amply, there is no question about the power of tribes to tax. I think the issues that our association and any other nonmember association probably is concerned about is the level and the fairness of the tax.

The level, it seems to me, based on the general rationale of the Supreme Court cases, ought to fairly relate to the services that a tribe delivers to its taxpayers. That is a fairly sophisticated analysis, and we are not in a position today to say whether a 4-percent tax on real property on the Blackfeet Reservation is or is not fairly apportioned to those services.

Needless to say, there is serious doubt on the part of our members that that is the case and that there are services delivered comparable to the level of the tax.

I should say in preface to that, Senator Melcher and members of the committee, that presently, the tax exempts farms, ranches, and businesses, so we are talking about a tax which is, momentarily at least, imposed on utilities and pipelines and the same kinds of facilities that you have heard from other testimony. But the thing that concerns us is that, unlike the Fort Peck tax, for example, the fact that farms, ranches, and businesses are not taxed is predicated on an exemption in the ordinance unlike the Fort Peck tax which simply does not include them.

So, if Fort Peck would want to impose a tax on home owners, farmers, ranchers, businesses, or whatever they don't tax, they would have to go through the process of adopting an ordinance and obtaining secretarial approval. In the case of the Blackfeet tax, we believe that all the tribal business council would have to do would be to delete the exemption by ordinance, and I think it is done.

I don't think that either the tribe things and I think there is a legitimate doubt as to whether or not there would be any requisite for secretarial approval or secretarial review. I think, therefore, the sword of Damocles sort of hangs over the head of everyone on the Blackfeet Reservation, and they wonder when that sword may fall.

So, we testify with great trepidation about the day when that happens.

Now, looking at the tax which is a 4 percent tax, I talked to the people in the Montana State Department of Revenue yesterday or the day before when I was finishing up this testimony, and they tell me that the average effective rate of tax in Montana on real property is about 1 to 1.2 percent of fair market value. I have explained the methodology by which we tax in my statement.

However, contrast that with the effective tax rate of the Blackfeet tax which is 4 percent. So, the Blackfeet are collecting a tax that is four times greater than all of the other taxes combined including State, county, city, town, and school district taxes. My example includes the mill levies in Cut Bank, and with this the total mill levy for all taxing entities is 318-point something mills on each dollar of taxable value.

So, you get obviously the basic governmental service from one or the other of those taxing entities, county, city, town, and school district. You get your police and fire protection. You get your administrative and governmental services from either Pondera or Glacier Counties or from Cut Bank or the town of Browning. You get these services already and our taxpayers have great difficulty trying to figure out exactly what services they would receive from the Blackfeet Tribe for any taxes they would be compelled to pay under this ordinance.

In any event it seems to me unlikely that whatever those services are that they cost the tribe four times as much as it costs the other three taxing entities to provide these same services. So, we think on its face, the 4-percent level is highly suspicious, and that is why we heartily support your measure, Senator Melcher, in declaring a moratorium on these taxes, and we would propose, as I said in my testimony, that during that interim, an appropriate government agency or the General Accounting Office do the numbers to see what kinds of services the tribes do deliver to their members so that the tax can be fairly apportioned.

I think we would feel much less badly about it if we could do that.

The other point that we make is that unlike any other tax in the world, there are no statutory constraints on the way the tax is imposed. For example, typically in local taxation, you have very sophisticated budgeting provisions. You must prepare a preliminary budget that lists every source of revenue and every preliminary expenditure. In many instances, the number of mills that can be levied are capped, and the taxpayers have an ample opportunity to review the preliminary budget once it is put together and to come and testify before the appropriate governing body.

Once they have testified and because they are voters in that particular taxing jurisdiction, it follows that at least the governing body will listen with appropriate deference, and if they think that they are faced with significant political muscle, they may alter their view of a particular tax or a particular level of tax.

Moreover, of course, you have access to the courts if you think the tax is absolutely illegal or is an abuse of the taxing power, and, furthermore, once a tax is imposed, you have the right to go to independent administrative tax review bodies and you can go to court.

None of those protections exists on the reservation. There is no budgeting, there is no sunlight on the tribe's budget, and we have no idea how much money they raise. We don't know how much they raise from any particular source, the Federal Government, the BIA. We do not know how that money is spent, and we have no ability to influence the Blackfeet Tribal Council, because the nonmembers up there obviously cannot vote.

So, other than being vocal if they are afforded an opportunity for a hearing, they really can't exert the same kind of political power that a nonmember can in his county or his city or his town or his school district.

So, we would propose that during the interim, either Congress devise or devolve upon the Secretary of Interior the duty to promulgate budgetary regulations which would be designed to throw sunlight on the tribal budgets and then require the same kind of displaying of the preliminary budget and the taking of testimony on the preliminary budget with the hope that that may influence the tribe or the tribe's governing body in the amount or the level tax.

The third thing that gives us great pause is that although there are the trappings of due process in the ordinance itself insofar as tax protests are concerned and appeals are concerned, it is due process, it seems to us, in form and not in substance.

For example, Ordinance 80 creates a tax protest panel, but in the provisions relating to the tax protest panel, there is nothing that requires the protest panel to conduct a hearing at all. It says it may conduct one if it wants to, but it doesn't have to conduct one, and it can simply render its decision. If the taxpayer continues to feel aggrieved, he can then take his protest to the Blackfeet Tribal Court where Resolution 80-A then goes on to provide a very elaborate procedural scheme for an appeal to the Blackfeet Tribal Court.

However, the one thing the rules say is that there is no hearing de novo. So, you may not have had an evidentiary hearing before the tax protest panel, and if you did get one, it was an act of discretion on the part of the panel.

Then, if you want to make a record before the tax protest panel, you the taxpayer have to pay for it. So, if you want a transcript of the proceedings before the tax protest panel, you have to bring your own court reporter in, pay for it yourself, and then take it up to the Blackfeet Tribal Court which can't give you a trial de novo.

Now, by a more recent modification, these rules provide that if the tax protest panel did not give you a hearing by reason of the fact that the issue involved a question of law beyond the competence of the tax protest panel, then you must go to the tribal court and specify what the issue is and what testimony you would like to give. And maybe if it was something that the court deems was beyond the competence of the protest panel, then possibly the Blackfeet Tribal Court would hear it.

What the court would consider to be beyond the competence of the tax protest panel, no one has any idea.

Of course, the bedrock problem with all of this is that none of these entities, either the tax protest panel or the court system, are independent in any sense of the word. Unlike the tripartite system of government that we are familiar with, that is not the case there. So, there is considerable concern about the evenhandedness of the process by which tax appeals would be dealt with insofar as they involve nonmembers.

So, we are concerned about the likelihood that there would be a lack of due process.

In summary, Senator Melcher, we do support your bill, and we support it wholeheartedly. We support the moratorium until there are some solid numbers which would demonstrate the appropriateness of this level of tax.

We solidly support your requirements of review and approval, because if those were enacted, I would think that if the tribe undertook to delete any of the exemptions which presently exist in the Blackfeet tribal tax, then it would require secretarial approval. I think that is not the case now. I think that could happen just by act of the tribal council.

If we felt the tax were appropriately apportioned and were fairly related to the services that the tribe delivers, while we wouldn't be thrilled, I think we would be more equable about that tax than we are now. But that requires a grinding of the numbers by an independent agency like the General Accounting Office to tell us to what extent and what the cost of the services are that the tribe does in fact deliver to us. Just on its face, 4 percent seems to be disproportionate to that.

We think also both in terms of the levels of taxation and budgeting issues that there ought to be an alternate administrative appellate path through the Secretary of Interior or some other independent entity to which a nonmember who feels aggrieved about these aspects of the tribes tax can go because it is going to do him no good as a nonmember and, therefore, a nonvoter to seek redress before the tribal governing body.

If, however, he could appeal to an independent board or entity like the Interior Board of Indian Appeals or the Secretary of Interior where he could get a binding decision on whether a tax is legal or is or is not an abuse of the taxing power's discretion, that would do a great deal, I think, to ensure the evenhandedness of taxation.

Similarly, in tax protests, for the reasons that I have just stated, where while you appear to have the trappings of due process, you really don't have them and it seems to us that nonmembers ought to have like protection in these matters also. They ought to be able to tax individual tax protests in an administrative route through the Secretary of Interior in order to obtain the benefits of procedural and substantive due process which we do not have assurances that he can get.

This is not to denigrate the tribal courts at all. As the tribal courts mature and develop, they are getting better and better, but tax appeals can be very sophisticated, and when the courts are not independent, you always wonder if, in the final analysis, they are driven by considerations outside of the record in the way that they decide these things.

Under Martinez versus Santa Clara Pueblo, there is no place to go once you have exhausted your tribal remedies. In all probability, absent habeas corpus, you don't go out of the tribal system. So, the nonmember is in a perpetual dilemma when he is dealing within a tribal system.

So, Senator Melcher, for all of these reasons, we solidly support your legislation. We would urge the adoption of it. We would urge that you devolve upon the Secretary of the Interior the responsibility of developing budgetary regulations which would throw sunlight on the tribes budget and which give a forum in which they can be heard and the ability to influence and shape the final budget and that they similarly provide for an independent review on tax protests.

I think with these additional procedural protections and with an independent study of what is a fair level of taxation—and, ultimately, obviously, as I listened to some of this testimony, these taxes should be apportioned as among all taxing jurisdiction involved—State, county, town and city and school district, I have not addressed that, but I support that. I think the tribes that give tax credits to other entities are doing the right thing there, so there is not duplicate taxation.

If, indeed, this tax were adopted with respect to home owners, commercial businesses, farms, and ranches, you would have an aggregate effective tax rate of over 5 percent—1 percent to States, cities, and counties, and 4 percent to the tribe.

So, thank you very much, Senator, for allowing us to testify.

[Prepared statement of Mr. Cannon appears in the appendix.]

Senator **Melcher**. Earlier, I referred to a quote Edward Paisano used in his testimony of Ross Swimmer, the Assistant Secretary of Interior. What has happened over the past few years seems to be an attitude within the Department of Interior can be construed as follows: The Department recognizes that there aren't many dollars to pass out because of budgetary constraints, so as we cut the Department and the Administration and Congress either agrees or disagrees, but, anyway, it seems to be a level that is not growing with the needs. It barely stays the same, and Indian needs get greater. So, there is less done in education and health and economic opportunity.

So, the other part of what Mr. Swimmer seems to be saying to the tribes is, go ahead and use your taxing authority. That is what he seems to be saying to the tribes.

I think that is a fair assessment. I think Edward Paisano's exact quote of a statement made by Ross Swimmer recently bears that out.

Obviously, there is a great variation in how tribes would approach that. Some have not imposed any new taxes. Some are delaying it. Well, the witness list we have today is pretty representative. The Shoshone have in place a 4 percent ad valorem tax but aren't collecting it and haven't set any time limit on when they are going to begin to collect it.

The Fort Peck tribes have imposed something on utilities, including the railroad which promptly gets into court and work out an agreement with the number of REA's and rural telephone associations that are on the reservation and collect $6,000 and impose a tax on a huge pipeline. A 48-inch pipeline is a—I don't know whether there are any other 48-inch pipelines in the United States.

That is a big pipeline, and they are collecting what, for the tribes, is a rather large amount, $1.1 million or thereabouts. It is a rather large amount for the Fort Peck tribes, but it is a rather small amount for that pipeline, and I think it has about—I don't know exactly how much, but it goes across the reservation in probably 80 or 90 miles of a 48-inch pipeline. That is a rather substantial pipeline and represents a great deal of investment and value.

And a possessory tax has been mentioned often.

The points that you are making, I think, are correct. You are looking at it this way if there is going to be such a tax by the Blackfeet, how does it compare to other taxes? Who arrives at it, and what is the procedure of imposing it, and how do you ever have an appeal out of it?

All these are significant points. But what can be avoided in this hearing, Ross, is this: we have more attorneys representing the tribes than there are attorneys representing those who would pay the tax who are not members of the tribes on these reservations.

So, if there is going to be public scrutiny, if there is going to be some development of a policy by Congress, it is obvious that there is going to have to be more input and more interest by those who are not members of the tribe and who will be subject to the tax. That hasn't come.

That is where the problem lies. If it is going to be truly a function of Congress to review this situation and to set the policy, it is going to take a lot more interest than what has been demonstrated so far.

Your organization may be looking at this very thoroughly, but there aren't too many organizations of nontribal members on the reservations that are looking at it thoroughly. I think you came here as a minority, and I think that is obvious in this hearing today.

Thank you for coming. I know you had a great deal of difficulty in getting here. I am glad you have made it. Your remarks will be made in conjunction with your written testimony in the record, and I want to thank you very much.

Mr. CANNON. Thank you, Senator.

Senator MELCHER. Now, we have Earl Old Person back with us, and we will hear from you, Earl.

STATEMENT OF HON. EARL OLD PERSON, CHAIRMAN, BLACKFEET TRIBE, BROWNING, MT

Mr. OLD PERSON. Thank you, Mr. Chairman.

I have submitted my testimony for the record.

Senator MELCHER. Your entire testimony will be made part of the record, Earl, so please proceed as you see fit.

Mr. OLD PERSON. First of all, I do want to express my appreciation for having this opportunity to come before your committee and to allow the Blackfeet Tribe to submit its testimony for the record.

I also want to say at this time that I appreciate the fact that you have concern for the taxation that is taking place within the Indian reservations and also that others and, of course, your committee are concerned about what it might cost the Indian reservations.

I would like to read the testimony for the benefit of those who are here.

Mr. Chairman, the Blackfeet Tribal Business Council has carefully reviewed, considered, and discussed S. 1039. The tribal council subsequently passed Tribal Resolution No. 40-88 which opposes S. 1039 and instead urges that the focus of any review for the adverse impact of taxation on Indian reservations be shifted to an examination of the levels of Federal and State taxation, levels which far exceed the level of tribal taxation.

The power to levy and collect taxes is an inherent aspect of the retained sovereignty of Indian tribes. This is a power which, until relatively recently, was not exercised for a number of reasons.

Many of the tribes had sufficient alternative sources of income to continue to meet the demand for the delivery of goods and services which are constantly placed on tribal government. On my own reservation, oil prices were high which meant more revenue for my tribe. Cattle prices were good which meant that our ranchers would make a living on their own terms without having to rely on the tribe. The timber industry was active, and the tribe, as a result, was realizing revenues from this industry.

The tribe was able to lease its land to Indian and non-Indian farmers and ranchers and realize even more revenues. In summary, the level of tribal revenues was sufficient to satisfy the demands which were placed on the tribal council and which the tribal council expected to satisfy.

Meanwhile, the Federal Government and State government all along have taxed individuals and commercial activities on the reservation to the exclusion of tribal taxation. The typical attitude of the State of Montana has been that the State will continue to tax whatever they want. The result has been litigation, and the tribe has been successful in every lawsuit concerning the State's authority to tax the tribe and tribal members.

Today, we are faced with a situation where our tribal revenues are not sufficient to satisfy the demands of the residents of the Blackfeet Indian Reservation. In 1982, for example, total tribal revenues were $7,911,436. In 1984, tribal revenues decreased to $4,693,918. For fiscal year 1988, tribal revenues are projected at $4,085,188.

The Blackfeet Tribe is continuing to supply Congress and reservation non-Indians proof of services, although we are proud that we can prove that we provide such a wide range of services. I have attached documents to demonstrate this proof of services. I might point out that the State does not have to supply this information when they impose a tax on the reservation.

The tribe is pursuing an economic model which will benefit all residents of the Blackfeet Indian Reservation. The tribe is majority shareholder in the Blackfeet Indian Writing Company which manufactures and markets writing instruments. The Blackfeet National Bank recently began operations as a federally chartered, tribally owned bank to serve the reservation and enhance the local economy.

The Blackfeet Tribe recently purchased 100 percent of the capital stock of Advertising Corporation of America, a company active in the specialty advertising industry. This company will be relocated to the Blackfeet Reservation so that more employment opportunities can be provided.

Also, the tribe has had a principal role in the establishment of Heart Butte Industries, a tribally owned clothing industry on the reservation which has negotiated major contracts with Commonwealth Edison of Cincinnati, Ohio. This industry is currently employing about forty people.

The point I am making is that the Blackfeet Tribe has taken the predominant if not the sole role in advancing the lifestyle of reservation residents. State taxation has historically served as a negative factor, because the truth is that the State and counties have not put back into the reservation any amount of funds near the amount of taxes which have been collected from reservation residents and reservation businesses.

Further, the levels of Federal and State taxation are, in turn, disproportionate to the actual level of tribal taxation. For example, the total State taxation on oil and gas production is approximately 22 to 25 percent. This compares with the tribe's level of taxation of 4.25 percent. Yet, the natural resource being taxed belongs to the tribe and tribal members in most instances.

This is an unfairness which is never addressed or proposed to be addressed by S. 1039 or any other Act of Congress. Someone should tell the Blackfeet Tribe and other Indian tribes what is improper about limiting Federal and State taxation on Indian reservations so that the reservation economies can truly sustain themselves. That is where true progress can be made so that a true reservation economy will be dynamic enough to be self-sustaining.

The Blackfeet Tribe and other Indian tribes do not want a continued fostering of the creation of an artificial economy. That is what an authorization of $525 million under S. 1039 does.

We who live on the reservations have said for years and years that the true answer to the proper exercise of sovereign powers is the establishment of strong Indian sovereigns who possess the capacity and professional judgment to make well-considered, fair-minded decisions. A continued strong reliance on the Federal Government is not the answer. Besides, the $525 million is merely an authorization and not an actual appropriation. Appropriations in this year of balanced budget mandates are simply not guaranteed by S. 1039. nor is it an attractive concept.

With respect to the argument that tribal taxation without representation is occurring. I would point out a number of things. First, the Blackfeet Tribal Business Council has adopted a policy regarding tribal ordinances in general and commercial and tax ordinances in particular. The policy mandates a public hearing with due notice to all affected parties. This is the policy, and it has been closely adhered to.

Second, the tribe often mandates a specified period of time for public comment, frequently in the form of written comment. The tribe had followed a pattern of publishing an entire piece of tribal legislation in the local newspaper, holding public hearings, and soliciting written comments. This proved to be too costly, so the tribe has made individual copies of the proposed legislation available to the public well in advance of the hearing date. Thus, anyone has the opportunity to review the legislation and express their views. The copies are provided at tribal expense.

If these methods of public input are insufficient, affected parties are always welcome to appear before the tribal council and express their concerns and recommendations. In my years of serving on the council, I have found many, many non-Indians pursue this avenue. Not once have they been denied the right and opportunity to discuss matters with the council directly. I would go so far as to say that the individual who lives on the Blackfeet Reservation has more access to the tribal government than any other government because of the frequency with which we meet.

I fail to understand the rationale behind arguments that the Blackfeet Tribe and other Indians are practicing taxation without representation. Tribal taxation is a legitimate exercise of a sovereign nation's authority to generate revenues.

For instance, if I travel to a State where a sales tax has been enacted, I must pay this sales tax. I have no choice not to pay, nor do I have the right to vote. I have subjected myself to that sovereign's jurisdiction as long as I remain within its territory.

The same principle applies when nontribal members come to the territory of an Indian tribe. So, the concept of sovereign taxation is not unique when the sovereign exercise of power and authority to tax occurs among Indian tribes.

The sad fact of the matter is that the Blackfeet Tribe and other Indian tribes cannot afford to operate at a deficit. The tribes must retain the inherent authority to tax in order to sustain the quantitative and qualitative standards of the delivery of goods and services to the residents of the Blackfeet Indian Reservation.

S. 1039 would stop the process of tribal sovereign development and reduce Indian tribes to what they have historically been, totally dependent on the Federal Government for minimal survival. We don't want this. We want to continue to experience the opportunities of self-development, and we want to take our rightful place in the national and international arena of sovereign-to-sovereign relations and relationships.

For these reasons, the Blackfeet Tribe opposes S. 1039.

I attached a copy of some of the services to the testimony that you have giving some of the services that we are providing at this time.

[Prepared statement of Mr. Old Person appears in the appendix.]

Senator MELCHER. Thank you, Earl.

I guess we haven't gone through this with any other witness, this particular point of taxation without representation, so we might as well go through it right here with you.

You and others have made that point that when you travel to Washington, for instance, you are subject to whatever taxes are imposed here. I don't think you disagree with me on this question of taxation without representation, but let's see if we do.

When that point is made by nontribal members about a tax on the Blackfeet Reservation or some other reservation, the point they are making is that they are not a part of electing the governing body that imposes the tax. They are not eligible to vote for that governing body. While they may appear, as you state, before the tribal council, no matter how many times they appear, no matter how many years they have lived on the reservation, no matter how much property they might have subject to the tax, they are not going to be allowed to vote for the governing body that establishes and collects the tax.

Is that true, Earl?

Mr. Old PERSON. Right. That is true, but I want to say this. As far as when people talk about the input into whatever the tribe does, I think people who are living on the reservation, non-Indians in particular, have just as much chance to come to the tribal council and have their input into anything that they disagree with, anything that they would want to discuss, as I have pointed out here.

Now, that goes for my people who are not on the council. They are allowed to come in and discuss the things that they feel need to be discussed that they want to have an input into for any matter that comes before them.

I guess I have served on the tribal council since 1954, and I have yet to see my tribe and my council deny anyone access to our tribal meetings, to be part of the discussions that we have. In fact, we invite our people that we feel have an involvement within our tribal matters, and a lot of times, we see that people that we try to involve fail to do so.

I might just say that in the years that I have served, I don't think my tribe has ever tried to go after any group or any individual just to try to gain something for themselves, but as I pointed out here, it had come to a point where it was a must, where our revenues were so down that we had to look for other sources, and we tried to work it in a way where we did not want to hurt anyone. We did not want to make it seem like we were going after someone just because we wanted to impose something on them that was going to be a hardship.

However, in the years that I have served on the council, we have been coming back here to the central office. Many of the tribal leaders have come back here. We have been asking for different kinds of help, seeking help to develop our reservations to help our people. Many times, we went back home disappointed.

I think this is why we begin to wonder what else we can do. If we cannot be heard, if we cannot be helped with these kinds of approaches that we have made, then we have to do something for our people.

The reservation is not a reservation that I tell my people is becoming so great. It is not a reservation that we can solely depend upon. We have to look elsewhere, and that which we have we are trying to use and trying to develop to help our own people.

So, we are not arguing the point that people should come and have an input or have a part of any discussions or any matters that we have, but we hope that someone will start seeing our way, our concerns, and the things that we are looking at that are going to be a hardship for our people in the future.

So, I am just sad that these kinds of things have to come at a time when something takes place such as taxation, and then we come up with alternatives—now, this is what we will give. Now, we don't question it, and I think that $525 million sounds like a lot to Indian people and to me, it sounds like a lot of money, but the other things that we fear as the Blackfeet people is, what actual amount is going to come to the people who actually need this money? This is another fear that we have.

So, we have a lot of concerns. At the same time, we are hoping that there is a way—and there must be a way—that we can come together and begin to work at these things that can help my people as well as helping others and that it will not cause the hardship that it seems to be causing at this time.

Senator MELCHER. Well, that is well said, Earl, but point that I was bringing up was taxation without representation. Now, in answering that and responding to that, you mention that you first went on the council in 1954. You were elected there.

Mr. OLD PERSON. Right.

Senator MELCHER. By vote.

Mr. OLD PERSON. Yes.

Senator MELCHER. I had assumed that was about the time that you went on the council as a rather young man, and you have been entrusted with that responsibility by the Blackfeet Nation ever since then. You understand what the power of the vote is, and I do, too. We almost parallel in getting elected to office, you at the tribal council and myself, first of all, as councilman for the city of Forsyth for the first time in 1953.

We both understand what the power of the vote is and what it means to us in our society. I just want to establish as part of this hearing record that when people talk about taxation without representation, you and I both understand. We know what they are talking about.

So, it is a joint responsibility. If we are going to have cooperation between people who are not members of the tribe on the reservation and those who are members of the tribe and have the power of the vote and exercise that appropriately, we have to start by recognizing each side and what the interests are and what the authorities are of each side.

The authority and power of nontribal members on the reservation is extremely limited because they do not have the power of the vote.

My concern, as I expressed earlier to you and to other tribal leaders in Montana is that unless properly done, this type of activity by the tribe of imposing taxes on nontribal members would lead to less opportunity for the area and specifically for the tribe and the tribal members. It is a heavy concern. I know it is one that you share.

I am glad you got here for your testimony, Earl. I assume you and others from Montana, if you came in yesterday, must have had some problems with getting into National, but I am very pleased that you got here. I think you add a lot of weight to the hearing record.

Just what is the 4-percent possessory tax of the Blackfeet being applied to right now?

Mr. OLD PERSON. Did you review the list that I attached?

Senator MELCHER. No, I did not review that list.

Mr. OLD PERSON. It gives some of the services that we are applying.

Senator MELCHER. No; I don't mean what you are using it for. I mean, what entities is the 4-percent possessory tax being applied to? Has the Blackfeet tax been applied to the Burlington Northern?

Mr. OLD PERSON. Yes.

Senator MELCHER. And is it in court along with Fort Peck?

Mr. Old Person. Right, and also the utilities and oil companies. That is what it is.

Senator MELCHER. Utilities in the case of the Blackfeet—is that Montana Power?

Mr. **Old Person**. Yes, and Glacier Electric.

Senator **Melcher**. In either case—is that in court, by the way?

Mr. **Old Person**. No, just the Burlington Northern.

Senator **Melcher**. Has it been collected from Glacier and from Montana Power?

Mr. **Old Person**. Glacier has paid in protest, $23,000.

Senator **Melcher**. And how about Montana Power?

Mr. **Old Person**. Montana Power has paid.

Senator **Melcher**. Not in protest?

Mr. **Old Person**. No.

Senator **Melcher**. How much was theirs?

Mr. **Old Person**. I believe it was $150,000, if I am not mistaken. Now, some of these other oil companies like Continental, Union are paying in protest.

Senator **Melcher**. Is Montana Power both in terms of electric utility and gas?

Mr. **Old Person**. Yes, power lines.

Senator **Melcher**. Electric power and gas.

Mr. **Old Person**. Yes. So far, we have collected $436,000 up to now for this year.

Senator **Melcher**. Are these all from utility companies?

Mr. **Old Person**. Yes, and oil and gas, but some of them have paid in protest, as I said.

I just want to make a remark on what you have said as far as allowing others to vote and take part in our tribal elections. Back in 1934, I guess it was, we were given an opportunity to come under an act, the Indian Reorganization Act. That allowed us to have tribal constitutions, charters, and to elect tribal officers to govern the reservation.

Now, until that is changed, until our constitution is changed to allow others to come on and to be voted or to be members of the tribal council, there is nothing that we can do at this time to allow that except that we are doing what we can within our powers to try to help and to take care of the needs that we see that are great at this time.

I am not saying that—let me say that this is an Indian reservation. This is a reservation that our people were able to keep, and I think we assume it in that way that this is a land that we are trying to do what we can with. I guess to allow others to come in, there is nothing that we can do unless we begin to change those laws that were brought to us to accept, and we accepted them in a way so that we can help ourselves with them.

So, I guess that is the only comment that I can make on that.

Senator **Melcher**. Well, Earl, you are not saying the Indian Reorganization Act would prohibit the tribe from allowing votes on a tax to be imposed and have non-tribal members vote on a tax to be imposed on them, are you?

Mr. **Old Person**. No; I am not saying that, but I am talking about our governing body.

Senator **Melcher**. Yes; I understand that.

Mr. **Old Person**. With that, I again want to thank you for allowing me to testify.

Senator **Melcher**. Thank you very much, Earl.

We will at last hear from the one who was supposed to be our first witness, Frank Ryan, Deputy to the Assistant Secretary for Indian Affairs of the Department of the Interior.

STATEMENT OF FRANK RYAN, DEPUTY TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, TRUST AND ECONOMIC DEVELOPMENT, U.S. DEPARTMENT OF THE INTERIOR

Mr. RYAN. Good afternoon, Mr. Chairman. Thank you for the courtesy you extended to me in changing the order of the witnesses.

I am pleased to be here today to discuss S. 1039, a bill to review and determine the impact of Indian tribal taxation on Indian reservations and residents.

We are strongly opposed to S. 1039 because it usurps the tribes' governmental authority to tax non-Indians within their reservations, it requires the Secretary of the Interior to review all tribal tax ordinances as a part of the Federal trust responsibility, it provides for $525 million in new annual appropriations authorizations, and it creates an unnecessary bureaucracy to develop data that can already be assessed by existing Congressional committees and executive branch personnel.

Apparently, the bill is premised on the assumption that non-Indians are not adequately protected from unfair tribal taxation and that increased Federal funding would eliminate the need for tribal taxation.

Tribal jurisdiction over non-Indians is a controversial matter in "Indian Country," but the courts have clearly ruled that under certain circumstances, tribes have the right to tax non-Indians living within the jurisdiction of the tribal government. Although the case law upholding tribal taxing power dates to the early days of this century, tribes have only recently begun exercising their taxing authority as they pursue various forms of economic development on their reservations.

In recent years, tribal jurisdiction over non-Indians has been the subject of frequent litigation. The recent Supreme Court decisions in *Merrion* v. *Jicarilla Apache Tribe* and *Montana* v. *United States* indicate that tribal authority over non-Indians is most clear and most extensive when non-Indian activities occur on Indian land. From a public policy perspective, we see no justification for limiting or controlling tribal authority to tax non-Indians who are using tribal property or transacting business with Indians.

S. 1039 requires the Secretary of the Interior, as part of the Federal trust responsibility, to review all tax ordinances proposed by an Indian tribe which would be imposed upon nontribal persons on an Indian reservation. Some tribal constitutions require the tribes to have certain of their tribal ordinances approved by the Secretary while others do not.

Another recent court decision, *Kerr-McGee Corp.* v. *Navajo Tribe,* found that no Federal statute or regulation requires secretarial approval if a tribe did not have a constitution and, therefore, had no tribal requirement to seek secretarial approval. A July 10, 1987, Congressional Report to the Congress, entitled "Taxation Within

Indian Lands: The Legal Framework," provides the following quote from that case.

"The court made a statement as to the relationship between tribal taxing authority and the current Federal policy toward Indian tribes:

"The Federal Government is firmly committed to the goal of promoting tribal self-government. The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs."

Mr. Chairman, we recently testified before the Interior and Insular Affairs Committee in the House of Representatives that we do not believe the Secretary should be reviewing and approving tribal constitutions. As we have said many times before in this committee, the Federal Government must get out of the way so that tribal governments can manage their own affairs. We are strongly opposed to the provision in this bill requiring a very heavy Federal role.

S. 1039 also authorizes appropriations of $525 million per year over the next two years to "alleviate economic hardship" and "alleviate emergency health care needs" on reservations. The authorization apparently stems form the finding in section 2 that "for six years, Federal funding for Indian programs has been reduced."

Insofar as we can determine, this finding is incorrect. Surveys of Federal agencies have indicated that government-wide outlays for special Indian programs has increased since fiscal year 1981, the final year of the Carter Administration, to fiscal year 1986, the last year for which final statistics are available, by $692 million. That is from $2.4 billion to approximately $3.2 million. Such an increase clearly calls into question the need for the additional authorization in S. 1039.

In summary, we do not agree with the assumptions underlying this bill. It is in the tribes' own best interest that they exercise their taxing power in a manner that is fair, equitable, and promotes, or at least does not discourage, economic activity that benefits the tribes and their members.

The Federal courts have consistently upheld the tribes' right to tax non-Indians within the jurisdiction of their reservations. The Department of the Interior also supports and encourages tribes to use their taxing power to generate needed local revenues.

This concludes my prepared statement. If you have any questions, I would be pleased to answer them.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Ryan appears in the appendix.]

Senator MELCHER. Mr. Ryan, you have some interesting figures here from fiscal year 1980 to and including fiscal year 1986. Are these adjusted for inflation?

Mr. RYAN. These figures are provided to me by—these are government-wide Indian funding figures that were provided to me from the Office of Management and Budget, and they show that in fiscal year 1981, in terms of actual outlays, it was $2.481 billion. This last year in outlays that we just concluded, 1987, it was $3.186

billion. So, that shows that over that period of time, there has been an increase.

There was one year, fiscal year 1982, when there was an actual decrease in outlays of approximately $110 million. Other than that, overall, the budget has been increasing.

Senator **Melcher**. Well, to get back to the question, Mr. Ryan, has it been adjusted for inflation.

Mr. **Ryan**. The answer is no, sir. These are actual outlays.

Senator **Melcher**. They have not been adjusted for inflation.

Mr. **Ryan**. They have not been adjusted for inflation.

Senator **Melcher**. So, what do they mean? To strike through all these figures, I just want to know what it means. Is this more purchasing power or less?

Mr. **Ryan**. Well, I have not done that analysis, but if you were to take a look at the highest years of inflation which occurred before the beginning of the Reagan administration, in terms of devaluing actual outlays and then were to compare the decline in inflation during the period of the Reagan administration, we might find that, overall, there had been a positive increase, in spite of inflation.

Senator **Melcher**. You might, but you haven't done it.

Mr. **Ryan**. No; I have not.

Senator **Melcher**. You have gone through all the work for this testimony without figuring out whether they are better off or worse off.

Mr. **Ryan**. In terms of inflation, no, sir. We have not done that work.

Senator **Melcher**. Well, thanks a lot. You know, you could have done us a real favor.

Mr. **Ryan**. If you would like, we can index this and provide it for the record.

Senator **Melcher**. I wish you would.

[Materials to be supplied appears in the appendix.]

Senator **Melcher**. You were on a commission for developing—was that a presidential commission to develop economic opportunity?

Mr. **Ryan**. Sir, I was the executive director of the President's Commission on Indian Reservation Economies.

Senator **Melcher**. In what years?

Mr. **Ryan**. In 1984.

Senator **Melcher**. Just one year?

Mr. **Ryan**. Actually, I was there for less than a year.

Senator **Melcher**. Did that commission do any good?

Mr. **Ryan**. It certainly provoked a lot of interest in Indian economic development.

Senator **Melcher**. Was there any more economic development? That is what I meant by doing good.

Mr. **Ryan**. Well, I don't believe that many of those recommendations have been carried forward. The belief of that commission was that, should those recommendations be carried forward, that there would be more economic development.

Senator **Melcher**. Did you ever get any of the commission's recommendations cleared through the Office of Management and Budget?

Mr. RYAN. To my knowledge, the report was never submitted to OMB. It was only submitted to the White House.

Senator MELCHER. Well, it got stonewalled there, I assume.

You know, we are not going to kid ourselves, are we, Mr. Ryan? Things are pretty tough on the reservation, and they haven't been getting any better, have they?

Mr. RYAN. I would have to agree. There have been a lot of difficult economic factors contributing to the growth of unemployment on Indian reservations, most notably the farm credit problems and problems with energy pricing and in mining. There has also been an increasing growth in the population so that the numbers of people in the labor force is increasing.

It is a difficult problem. It is one which tribes share with the States, actually, in those regions where States have also been affected by the difficulties in agriculture and in energy and mining.

Senator MELCHER. As a matter of fact, if you wanted to pick out an area that was really clobbered over the past several years, you would pick out Montana and the Indian reservations, wouldn't you?

Mr. RYAN. Well, I am certain that Montana is not suffering any less than other areas. We haven't looked at which——

Senator MELCHER. All those Indian reservations east of the divide, beginning with the Blackfeet and extending clear across two-thirds of the area of Montana were not only subject to the rather harsh conditions of commodity prices beginning with agricultural commodities and going right through energy commodities, but they also had the further aggravation of drought over the past several years—not the last two years, but prior to that, about a three-year drought, didn't they?

Mr. RYAN. That is correct.

Senator MELCHER. So, they really had it harsh. But this commission you were on just a short time, whatever your recommendations were didn't seem to get out of the White House. Are these commissions that are appointed by the President, this administration or other administrations, just kind of useless?

Mr. RYAN. Well, there are varying opinions about that. This administration has been overall trying to reduce the numbers of commissions. I believe the last I read about it, there were upwards of close to 30,000 government-wide, including all of those commissions, councils, and committees covered by the Federal Advisory Committee Act.

In many ways, they are very good, because they are a good way for people to get involved in deliberating on certain technical things and advising administrations and Congress about what steps should be taken. There is not a lot of reward for the people who participate in them except knowing that they have worked hard on something.

Sometimes, my guess is that some of the things they recommend are received more positively than at other times.

Senator MELCHER. Well, this bill that we are discussing has as commission. You stated it is not needed, but that is what it would do, advise Congress and the Administration on matters of taxation.

Mr. RYAN. Well, one of the difficulties here is if you were to have a commission on this, you would get involved in—it would actually be quite a bit of work, because you would have to get involved in substantive issues on valuation. You would have to acquire all sorts of information, and that is very difficult.

One of the gentlemen who was here earlier—I believe it was Mr. Cannon—pointed out how difficult it is to be able to do a fair and equitable job of assessing value and determining that procedures are fair and so forth. It strikes me that this would be a very, very ambitious undertaking by a commission, in terms of being able to acquire the knowledge and then to substitute its values, and have its own analysis. Effectively, what it would be doing is second-guessing other taxing jurisdictions about what equity means and making recommendations.

I am not sure that fundamentally, the numbers you would get would be accurate, and I am not sure whether or not that commission, if it were to exist, might not come under a lot of criticism and scrutiny as well as the one that I had the distinction of working on.

Senator **Melcher**. You don't seem to be working on the very matters that this commission would be instructed to look at. You have the field staff out there collecting all tribal tax ordinances, have you not?

Mr. **Ryan**. The Assistant Secretary did send a memorandum out to his area directors and asked them to send information in on what tax codes existed. To the best of my knowledge, there are something like 80 taxing ordinances that are out there. I am not sure how many of those are ordinances which are actively being implemented.

Senator **Melcher**. Well, you and others in the Department of Interior have been involved in directing that the Bureau of Indian Affairs develop guidelines for review of tax ordinances for tribes. Correct?

Mr. **Ryan**. I am not sure. That may be true. I just don't know.

Senator **Melcher**. What goes on in the Department regarding Indian affairs that the Deputy to the Assistant Secretary of Indian Affairs doesn't know about it?

Mr. **Ryan**. Well, there is a Deputy to the Assistant Secretary for Indian Affairs for Tribal Services who has within her area of responsibility "Tribal Governments", and I am here today representing the Assistant Secretary. I apologize if I am unaware of the fact that another office is working on any guidelines.

Senator **Melcher**. Well, that is nevertheless what is going on. I guess he can advise you then and tell you.

Mr. **Ryan**. I am informed that a member of the Assistant Secretary's staff, Catherine Wilson, is working on such guidelines.

Senator **Melcher**. What are you going to do, establish by regulation what the commission was going to advise the Congress and the Administration?

Mr. **Ryan**. Exactly what the content of those guidelines are, I am not familiar with, but I would be very pleased to present them for the record to explain to this committee exactly what the thinking processes are.

Senator **Melcher**. You know, guidelines, to me, mean regulations. Is that right or wrong?

Mr. **Ryan**. Well, guidelines can be regulations, but they can also be protocols and procedures governing actions of Federal employees which would make it more like a manual provision. I am not clear on whether or not this is of such a stature as to be a regulation that needs to be published or whether or not it is something controlling actions by bureaucrats.

[Materials to be supplied appear in the appendix.]

Senator **Melcher**. Well, at any rate, if this bill said only that it authorizes $525 million to take care of some of the pressing needs on Indian reservations in Indian health, Indian education, and tribal economic opportunity on the reservation, the Administration would oppose it, would it not?

Mr. **Ryan**. Based upon a Congressional finding that there has been a decline in appropriations, I believe the Administration would oppose it. Yes, sir.

Senator **Melcher**. That is what I thought.

All right. Thank you very much, Mr. Ryan.

Mr. **Ryan**. May I add something?

Senator **Melcher**. Sure.

Mr. **Ryan**. You raised a question about the President's commission, and that commission did deliberate on this issue, on the tax policy, fiscal policy, and equity effects. It is a very, very difficult issue to consider, because, first of all, it is complex. Second, the burdens don't always fall equitably. Third, certain people are not always permitted participation in the process.

It seems that when governments talk to each other, it is usually a case of, "I have the power or you have the power," but it is not always the case that there is some kind of shared responsibility with respect to people who happen to live within jurisdictions with overlapping responsibilities and power.

So, there have been cases where tribes and local taxing jurisdictions have worked out agreements. This Administration has sought to encourage tribes to work out their disagreements.

One of the reasons for that is that the National Advisory Association of County Governments, NAACO, had provided information to the President's commission on all of the conflicts it had. The commission took a look at conflicts between State and local governments and tribes, and it analyzed those conflicts.

It found that where tribes and State and local governments had agreements over certain subject matters, it was very interesting that you found very few conflicts. So, it seemed a common sense sort of judgment to say gosh, where people have worked out their differences, there aren't any conflicts and they are not in court on it.

So, a conflict resolution or negotiation or mediation compromise approach is, I think, a good way of reconciling differences. But even if you had an approach like that and even if you encourage it, that doesn't change what the lay of the land is if someone decides to do what might amount to stupid fiscal policy and to tax everything to death where it is purely a power issue and where other people are not permitted to participate in the processes that allocate those burdens or provide those services.

When the commission considered it, one of the recommendations that it came up with was "modernizing tribal governments." I believe it was one of the recommendations that suggested permitting special tribal referenda which would allow non-Indians within the jurisdictional boundaries of reservations to actually vote. They would not have any interest in a property sense in any tribal assets or any individual Indian assets, but they would have, if the tribe permitted it, a right to vote and also a right to be served or to benefit from those taxes.

The way the theory went, in the recommendation, was that if a tribe had a referendum and permitted everybody residing within its boundaries to vote, in exchange for doing that, the State would surrender any of its taxing authority on reservations.

So, it seems then that you would have two kinds of situations. On a reservation that is predominantly Indian, the Indians would probably vote to enfranchise non-Indian voters. Then, there would be no State taxation or regulation of any kind. On a reservation where it is 50 percent or more non-Indian, if the tribe permitted the referendum, there would be a non-Indian vote.

However, it may be that non-Indians would actually vote for tribal jurisdiction, because even though the tax assessment may be 1.2 percent or something like Mr. Cannon pointed out, the rate might actually be less because a lot of the money that is assessed and paid to the State goes for other things in the form of a broader range of services that are not directly provided to the people living locally within the boundaries of the reservation.

The only way for someone to know whether or not they wanted to vote for tribal jurisdiction over them and not State jurisdiction over them would be to look at what the actual numbers are.

However, it seemed that if compromise and negotiation is not the preferred approach, then some other approach that perhaps tries to deal with the fundamental issue of preserving a tribe's right to govern itself according to its own laws yet providing some means and process for people living there to participate needs to be developed.

If we don't struggle with those kinds of complex issues, then it will simply be a matter of an issue of power, and all of those power issues have consistently, I believe, been resolved against the Indian people, and I don't think that is what we need to do.

I also have some agreement with what some witnesses may have said. Tribes need to assess why they are taxing, and they have to realize that they could actually create a lot of harm by some of these taxes by driving business off of a reservation and that many sovereigns use low taxes as an incentive to encourage businesses to locate rather than to unnecessarily raise the costs of doing business.

Senator **Melcher**. What was that commission called?

Mr. **Ryan**. That was the President's Commission on Indian Reservation Economies, and there was a section in that report that dealt with modernization of tribal governments. This was one of those recommendations that was very poorly understood by most of the people who were frightened by the report, fearing that the referenda issue would do something awful. Actually, it was seen as a way of trying to reconcile some of these participation issues and yet preserve a tribe's right to have its own laws, its own separate standards of review, and so forth.

Senator **Melcher**. The commission's report was submitted to the President. I suspect that that portion of it that dealt with taxation matters on the Indian reservation might be pertinent to this hearing record. Are you permitted to submit that portion of it to this committee?

Mr. **Ryan**. I can get a copy of it and provide it for the record in the sense that I have referenced it.

Senator **Melcher**. I would appreciate that and that portion of the report which deals with taxation which seems to be specific to what we are talking about we will make part of the record of this hearing at this point.

[Materials to be supplied appears in the appendix.]

Senator **Melcher**. I appreciate your comments, Mr. Ryan. I think they are very appropriate. You share some of the concerns that I have and perhaps express them better than I have. That comes from your background as a Montanan and was not blotted out by your days at Harvard.

Mr. **Ryan**. I am sure that if there is any eloquence, it has to do with living in Blaine County and getting a good dose of common sense out there.

Thank you, Mr. Chairman.

Senator **Melcher**. Thank you very much.

The hearing record will remain open for 2 weeks. There may be additional materials submitted for this record.

I will make part of the record right now some of the letters that have been addressed to myself or other members of the committee. I have a letter from the National Rural Electric Cooperative Association from Bob Bergland. I will make that part of the record.

There is a letter here to Senator McCain from Peabody Coal Company. We will make that part of the record.

[Letters submitted by Senator Melcher appear in the appendix.]

Senator **Melcher**. The hearing record will remain open for two weeks so that other submissions may be included.

I thank all our witnesses for coming to share their views with us today, and the committee stands adjourned.

[Whereupon, at 12:51 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

OPENING STATEMENT

SENATOR DANIEL K. INOUYE

HEARING ON S. 1039

GOOD MORNING. OUR HEARING TODAY IS ON S. 1039, A BILL TO REVIEW AND DETERMINE THE IMPACT OF INDIAN TRIBAL TAXATION ON INDIAN RESERVATIONS AND RESIDENTS. THIS BILL WAS INTRODUCED BY SENATOR JOHN MELCHER ON APRIL 10, 1987. SENATOR BAUCUS AND SENATOR SIMPSON ARE ORIGINAL CO-SPONSORS.

S. 1039 CONTAINS SEVERAL CONGRESSIONAL FINDINGS, INCLUDING FINDINGS THAT NUMEROUS INDIAN TRIBES ARE CURRENTLY IMPOSING TAX ORDINANCES TO PROVIDE REVENUES; THAT FOR SIX YEARS FEDERAL FUNDING FOR INDIAN PROGRAMS HAVE BEEN REDUCED; THAT NON-TRIBAL PERSONS ON RESERVATIONS HAVE PROTESTED THE IMPOSITION OF TRIBAL TAXES; THAT SOME OF THE TAX PROPOSALS WILL HAVE AN ADVERSE ECONOMIC IMPACT ON RESERVATIONS TO THE DISADVANTAGE OF BOTH TRIBAL AND NON-TRIBAL PERSONS RESIDING ON RESERVATIONS; AND THAT IT IS ESSENTIAL AND NECESSARY THAT CONGRESS REVIEW INDIAN TRIBAL AUTHORITY TO IMPOSE TAXES ON NON-TRIBAL PERSONS ON INDIAN RESERVATIONS.

SECTIONS 3, 4, 5 AND 6 OF THE BILL PROVIDE THAT NO TRIBAL TAX ORDINANCE WHICH WOULD BE IMPOSED UPON NON-TRIBAL PERSONS ON AN INDIAN RESERVATION COULD TAKE EFFECT UNLESS AND UNTIL THE SECRETARY OF THE INTERIOR FIRST REVIEWED AND APPROVED THE

ORDINANCE. A TWO YEAR MORATORIUM IS IMPOSED ON APPROVAL OF ANY SUCH TRIBAL ORDINANCE. THE REVIEW REQUIRED IS DEEMED TO BE A TRUST RESPONSIBILITY OF THE UNITED STATES. SECTION 7 OF THE BILL DIRECTS THE PRESIDENT TO APPOINT A COMMISSION TO REVIEW THE ECONOMIC IMPACT WHICH TRIBAL TAXES HAVE UPON INDIAN RESERVATIONS AND REPORT TO CONGRESS WITHIN ONE YEAR AFTER ENACTMENT OF THIS ACT. SECTION 8 AUTHORIZES APPROPRIATION OF $525 MILLION PER YEAR FOR TWO YEARS AFTER ENACTMENT OF THIS ACT FOR HEALTH, EDUCATION AND ECONOMIC DEVELOPMENT PROJECTS.

IN RECENT YEARS TRIBES HAVE BEGUN TO EXERCISE TAX AUTHORITY EFFECTING THE INTERESTS OF NON-INDIANS AND NON-INDIAN BUSINESS ENTITIES WITHIN THEIR RESERVATIONS. THERE HAVE BEEN A NUMBER OF RECENT FEDERAL COURT DECISIONS REVIEWING THE AUTHORITY OF TRIBES TO IMPOSE TAXES ON NON-TRIBAL MEMBERS OR BUSINESS ACTIVITIES WITHIN AN INDIAN RESERVATION. THE GENERAL AUTHORITY OF THE TRIBES TO IMPOSE SUCH TAXES HAS GENERALLY BEEN AFFIRMED, BUT IN THIS CONTEXT JUDICIAL GUIDELINES FOR THE AFFIRMANCE HAVE EMERGED.

THE PURPOSES OF OUR HEARING TODAY IS TO RECEIVE THE VIEWS OF THE ADMINISTRATION, PERSONS AND PARTIES UPON WHOM THE INCIDENCE OF THESE TAXES MAY FALL, AND FROM THE INDIAN TRIBES. OUR FIRST WITNESS IS MR. FRANK RYAN, DEPUTY TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR.

Al Simpson

STATEMENT OF SENATOR ALAN K. SIMPSON

REGARDING S. 1039

A BILL TO REVIEW AND DETERMINE THE IMPACT OF INDIAN TRIBAL TAXATION ON INDIAN RESERVATIONS AND RESIDENTS

November ~~10~~ 12, 1987

Select Committee on Indian Affairs

Mr. Chairman, I appreciate this opportunity to make a statement regarding S. 1039. As you know, I have joined with you and Senator Baucus as original cosponsors of this legislation. I did so after serious consultation with some constituents in my state who were concerned about the proposals of the Crow Indian Tribe to institute a broad array of taxes upon both Indians and non-Indians on the Crow Indian Reservation in Montana and Wyoming.

In visiting with these constituents I heard statements like "taxation without representation" and other comments of deep concern regarding the proposed tax ordinances. For these reasons, I believe that S. 1039 is a reasonable approach to at least reviewing the entire situation. Currently there are "taxing ordinance" proposals pending in other parts of Wyoming as drafted by the Shoshone and Arapahoe Indians. The Shoshone and Arapahoe-plan differs substantially from the Crow Indian plan in that it has been drafted with the assistance of non-Indians and Indians alike. The Shoshone and Arapahoe Indians provided reasonable public comment periods prior to formulating any specific taxing plans. Theirs was a much more measured approach to taxation than that suggested by the Crow Indians. However, in my mind, this is an example of why S. 1039 deserves serious consideration. Indian tribes throughout the country have been or are developing these "taxing ordinances." Often there is great disparity between the suggested proposals. S. 1039 would provide for the establishment of a Presidential Commission to review the economic impact of these taxes on all persons and to report to Congress with that information. Additionally, it requires the Secretary of the Interior to review the taxing ordinances. With this type of oversight, I feel some semblance of order could be introduced into the taxing programs and thus bring about uniformity, constancy, and consistency in application and also provide for a pool of talent to assist and advise both Indians and non-Indians alike on the best method of taxing and the possible impacts.

I would also note, Mr. Chairman, that it is not just non-Indians who are concerned about these taxing proposals. I have been contacted by Indians in the State of Wyoming as well, who are very concerned about the effect of such taxes on personal income and on the economy of the reservation as an entity. Again, I believe that the review of these taxing proposals and a considered study of their effects would help us to answer a large number of these questions prior to any implementation of these ordinances.

I will be most interested in reviewing the testimony of the witnesses here today. This hearing is an important first step in further reviewing the legislation and obtaining the thoughts of both proponents and opponents -- as well as the Administration. Again, Mr. Chairman, I thank you and commend you for holding this hearing. I stand ready to assist with this legislation as you attempt to move it out of Committee and to the Senate floor for full consideration of our colleagues.

~~WCM/dc~~

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FINANCE & CLAIMS
BUSINESS & INDUSTRY
NATURAL RESOURCES
LABOR

Nov. 12, 1987

SENATE INDIAN AFFAIRS COMMITTEE:

My name is Delwyn Gage and I am a state Senator from Senate Dist. 5 in Montana which includes all of the Blackfeet Indian Reservation. I am giving this testimony on behalf of both the Indian and non-Indian people of my senate district. If you are not aware of it at this time you need to know that there is not only non-Indian people living on various Indian Reservations in Montana but there is also non-Indian ownership of both real and personal property on most of the Reservations in Montana.

I have enclosed previous testimony that I have given at various times with regard to Indian affairs in Montana. This testimony will up-date what I have enclosed. In addition to the taxes on oil and gas on the Blackfeet Reservation, we now have a possessory interest tax which the Blackfeet Tribal Council has interpreted to be a tax on various utilities that are located on the Reservation. These taxes have been assessed on the Glacier Electric Co-op, a rural electric utility that furnishes electricity to both reservation and off reservation consumers. Glacier Electric is now passing this tax on to the consumers in the form of an added charge on each customers bill each month whether you live on or off the reservation and whether you are Indian or non-Indian. I tell you this to let you know that it is my understanding that the Blackfeet Tribe was to show that the tax money was to be used to furnish services to those who are served by the area from which the tax money is collected. I receive no benefit at all from the services of the Blackfeet Tribe yet I am paying a part of the

Montana State Senate

SENATOR DELWYN GAGE
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The Big Sky Country

COMMITTEES:
FINANCE & CLAIMS
BUSINESS & INDUSTRY
NATURAL RESOURCES
LABOR

tax which they assessed. You may say my problem is with Glacier Electric but it stems from the possessory interest tax assessed by the Tribe.

In addition to that the Glacier Electric Co-op is also paying taxes on the same property to Glacier County, to School Dist. 15, to the University system of the State of Montana as well as other taxing jurisdictions. Is it right that property can be assessed by the state of Montana and its political sub-divisions as well as another sovereign nation which is the Blackfeet Tribe? Is it right that Glacier Electric Co-op pay taxes to an entity, the Blackfeet Tribe, in which they have no voice through any kind of representation? The directors of Glacier Electric Co-op are not able to even vote for or against those who serve on the Blackfeet Tribal Council.

Will you search back in your U.S. history lessons and recall a time when themembers of the then colonies of this country were being taxed by the mother land, which taxes were going back to England with no benefit to the people paying the tax, and further which colony members had no voice in the imposition or use of that tax money. You will further recall that to a large degree this lead to the Revolutionary War. What an ironic turn of events. The events which lead to the founding of this great nation are now being practiced within this nation.

I would ask this committee to urge Congress to not only pass S. 1039 but to also, after the study proposed by this bill has been completed, look at

Indian Affairs in the United States. You must realize that the treaties which were signed with the Indian Nations were signed during a period in history which is vastly different from the situation today. The purposes for which those treaties were entered into for the most part have been long ago surpassed and served and it is now time to re-evaluate the treaties and to implement legislation that will more fully serve the Indian and non-Indian alike. If the Indian tribes are going to survive the problems of double taxation, taxation without representation, sovereign nation status and all the related jurisdictional problems must be addressed by congress. To leave the solution of these complex problems to the court system is irresponsible, expensive and far too time consuming.

All of the above referenced problems place the economy of the Indian Reservations at a tremendous disadvantage in competing with the rest of society and will defeat the very purpose of the Indian Self-determintation Act which was enacted by Congress.

Other than for enrollment and qualification for various programs, the percentage of Indian blood has very little to do with determining who is an Indian. Being an Indian is a state of mind more than blood analysis. Please do all that you can to aid in the solution of this age old problem.

Delwyn Gage, Senator
Dist. 5, Montana Stat e Senate
Chairman of the Montana State Legislative Indian Affairs Committee

Crows fire James Watt as legal counsel

By PATRICK DAWSON
Tribune Correspondent

BILLINGS — James Watt, former Interior Secretary, was fired Thursday by the Crow Indian Tribe because he kept his clients in the dark, according to Crow Tribal Chairman Richard Real Bird.

Real Bird and tribal lawyer Jean Bear Crane had just returned from Washington, D.C. Thursday night.

Watt, now a Wyoming lawyer, was hired by the tribe in 1985 to represent the Crows in a claim against the federal government over a boundary dispute.

The 107th Meridian — the north-south boundary that divides the Crow from the Northern Cheyenne reservation — was incorrectly surveyed earlier in the century. As a result, the Northern Cheyenne reservation's western edge held a narrow strip of land that legally belonged to the Crows. The error was first acknowledged by the federal government about 30 years ago.

The disputed strip is about 56 miles long, no more than ¼ mile across at its widest point, and contains over 30,000 acres, according to Real Bird, who says a new survey of the land may be necessary.

Watt, who left the Reagan administration to run a consulting firm specializing in Indian economic matters, was retained by former Crow Tribal Chairman Donald Stewart. Under that agreement, Watt was to receive ten percent of whatever settlement he could obtain for the Crow Tribe. A 1982 Bureau of Indian Affairs appraisal placed the surface value of the disputed strip at $130 million. In an interview at the Billings airport Thursday night, Real Bird said that minerals, water and wildlife values of the area were not considered in the appraisal.

Real Bird said he gave Watt 30 days notice, and that Bear Crane was sworn in as the tribe's counsel Thursday before the U.S. Court of Claims, where the 107th Meridian case is being considered.

"It wasn't an easy decision to make," said Real Bird. "James Watt has not reported to the tribe in depth since he got the contract."

Watt was not diligent in representing the tribe, said Real Bird, and made too many damaging concessions to the government in his briefs. Without the tribe's knowledge, Watt allowed that the government had not breached its fiduciary duties to the tribe in allowing the boundary error, which is opposite to Real Bird's viewpoint.

Jean Bear Crane said Thursday that a Court of Claims judge was prepared to grant the tribe just $2 million for the claim.

"I've never been consulted," said Real Bird. "Whenever we asked him about the case, he would just say, 'The fight goes on!' It is my reponsibility to have some input in what goes in that brief. I have been denied a chance to protect my tribe's interests. The decision to fire Mr. Watt required much thought, and I knew it would be controversial, but I was thinking of the future of 7,000 members of the tribe."

Watt, who keeps an office in Jackson, Wyo., made many cuts in tribal programs when he was Interior Secretary, and once called Indian reservations 'failures of socialism.' When he left Washington, he proposed various economic ventures for Indian tribes, including oil drilling and a hotel project for the Commanches of Oklahoma.

Real Bird said the next Crow General Council in April will be asked to approve a replacement for Watt so that the claim process may continue.

Proposed reservation tax draws opponents

y LINDA CARICABURU
ribune Regional Editor

BROWNING — Opponents of a w tax on the Blackfeet Indian servation say it will erode eco- mic development, cause personal d business hardships and decrease me utility service in the area.

Tribal officials, meanwhile, say e tax is necessary to maintain es- ntial tribal services, such as health ograms, the tribal court and the lackfeet Community College.

The comments were heard Tue- y morning at a public hearing on e proposed tax, which is aimed pri- arily at utilities, rail lines and the and gas industry. More than 100 ople attended the hearing, held at e Browning High School gymnasi- n.

Bill Haltom, a New Mexico attor- y whose law firm helped the tribe aft the 4 percent tax, said the U.S. preme Court has already estab- hed the authority of tribes to im- se taxes. He said the trend now is r tribes to do so. Haltom said his m has recently assisted seven her tribes in the country estabish ch taxes.

A attorney for Burlington North- n Railroad, Mike Webster, disagreed that the tribe automatically has full power to implement the tax, saying the Blackfeet proposal is "probably beyond the power of the tribes" and "subjects the tribe to attack on several points."

Among other things, Webster said BN disagrees with the taxing formula, the notification time given to companies and the appeals process. Webster said companies should be able to appeal to an independent panel instead of a group of tribal council members.

Given the listed exemptions to the tax — including retail and wholesale businesses, farms and ranches, homesteads and utility lines that exclusively serve the reservation — Webster said BN views the tax as discriminatory against "a few large corporations or a few large utilities."

A spokesman for Mountain Bell called the proposal "a disincentive tax" that makes the cost of doing business on the reservation higher than it already is. "Businesses will leave the reservation for the outlying areas," he said.

As far as telephone service, he said Mountain Bell will ask the Public Service Commission for a rate increase on the reservation, "which would cost, perhaps, $5 to $10 per month, per customer increase" for the 425 customers on the reservation. He said Mountain Bell promised to "be in the forefront" of litigation opposing the tax.

Bill Chapman, head of Glacier Electric Co-op, which provides electricity to the area, said "cheap affordable electricity ... may be in jeopardy" on the reservation, because of the tax.

He said Glacier Electric, which is a non-profit business, said the tax may cost the firm between $100,000 and $350,000 in additional taxes each year. He said many of the co-op's ratepayers, who will have to absorb the expense, live within the reservation boundaries and may see "dramatically" higher electric bills.

In addition, he said the co-op's board of trustees is now considering several options to reduce taxable valuation on the reservation, including closing the new Browning office and halting construction and improvements on all lines and substations on the reservation.

"We simply cannot afford to add any taxable valuation on the Blackfeet Reservation," Chapman said. He said up to $5 million in construction was planned in the immediate future and $30 million in the next several years. "All of these (construction projects) have been stopped."

Chapman denied that such actions would be "retribution" against the tribe for the tax, but called them "simply a matter of economics."

Chapman appealed to the tribal tax officials to implement business incentives instead of measures "that drive existing businesses off the reservation ... Let's provide jobs and paychecks instead of adding to unemployment and welfare checks."

Some of the harshest criticism of the tax came from Glacier County Attorney James Nelson, who said there are already plans by those companies being taxed to pay all taxes in Montana under protest until the tax situation changes.

"That tax money will be tied up for years" in litigation, he said, which would have a "very adverse affect on the ability and level Glacier County will be able to provide services." He said the county will be left "with no other alternative" than to cease providing some basic services.

Nelson chastised the tribe for proposing a tax that singles out "the very business and the very people" who provide jobs and stability for the area. He said the proposal will kill the initiative of these companies to invest in Montana at a time when "the entire economy of this county and this state are in a severe decline."

As the local economy erodes, Nelson predicted the tribal council will use its authority to expand the tax.

"It's going to wind up being a tax on property owners; it's going to wind up being a tax on farms; it's going to wind up being a tax on businesses," he said.

Nelson said it was "intellectually dishonest" for the tribe to pass out copies of tables showing that "tribal-related" funds pay for a large share of services to the county because most of that money is from federal taxes or grants.

But Eloise Cobell, head of the tribe's finance department, listed over 20 services provided all or in large part by funds raised by the tribe. These include programs for alcoholism, child neglect and abuse, senior citizens, culture, home health service, the tribal college and campground maintenance.

Cobell emphasized that these programs "are enjoyed by both members and non-members."

Several people spoke in favor of the tax, including Darryl Kipp, who questioned whether Nelson, as county attorney, is really representing Glacier County, or just the Cut Bank area and businesses. Kipp noted that Browning makes up a large part of Glacier County.

Kipp also questioned whether the decision of the board of trustees of Glacier Electric Coop truly reflected the needs and desires of its ratepayers, many of whom live on the reservation.

He called opposition to the tax part of the "never-ending onslaught on the status of tribal government, on the status of tribal people." He also called on the tribal council to better inform the public on such issues as the tax so there would not be such an "enormous negative backlash against us."

Browning Mayor Julene Kennerly said she favors the tax because the services of the tribe are necessary to the people in the area.

"Browning depends on the tribe," Kennerly said, adding that without it "there wouldn't be much left of Browning."

INITIATIVE MEASURE NO. 456

AN ACT Relating to state government; and creating new sections. **BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:**

NEW SECTION: Sec. 1. The people of the state of Washington declare that an emergency exists in the management of salmon and steelhead trout resources such that both are in great peril. An immediate resolution of this crisis is essential to perpetuating and enhancing these resources.

NEW SECTION: Sec. 2. The people of the state of Washington petition the United States Congress to immediately make the steelhead trout a national game fish protected under the Black Bass Act.

NEW SECTION: Sec. 3. The people of the state of Washington declare that conservation, enhancement, and proper utilization of the state's natural resources, including but not limited to lands, waters, timber, fish, and game are responsibilities of the state of Washington and shall remain within the express domain of the state of Washington.

While fully respecting private property rights, all resources in the state's domain shall be managed by the state alone such that conservation, enhancement, and proper utilization are the primary considerations. No citizen shall be denied equal access to and use of any resource on the basis of race, sex, origin, cultural heritage, or by and through any treaty based upon the same.

NEW SECTION: Sec. 4. The people of the state of Washington declare that under the Indians Citizens Act of 1924, all Indians became citizens of the United States and subject to the Constitution and laws of the United States and state in which they reside. The people further declare that any special off-reservation legal rights or privileges of Indians established through treaties that are denied to other citizens were terminated by that 1924 enactment, and any denial of rights to any citizen based upon race, sex, origin, cultural heritage, or by and through any treaty based upon the same is unconstitutional.

No rights, privileges, or immunities shall be denied to any citizen upon the basis of race, sex, origin, cultural heritage, or by and through any treaty based upon the same.

NEW SECTION: Sec. 5. The secretary of state shall transmit copies of this act to the president of the United States senate, the speaker of the United States house of representatives, and each member of congress.

NEW SECTION: Sec. 6. If any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Explanation of Blackfeet possessory interest tax

Any government must raise money to provide services to all those within its jurisdiction -- citizens, residents, businesses, tourists, etc. Indian tribal governments, as sovereign entities, are not exempt from this responsibility.

In recent years, Indian tribes, like states and counties, have been hurt by increasing federal government budget cuts and resulting service reductions. As a consequence, Blackfeet Tribal leaders are pursuing options which will make it possible for them to continue providing basic governmental services to all persons within the Reservation boundaries. In keeping with the Tribe's commitment to responsible government, the Blackfeet Tribal Business Council has enacted a Blackfeet possessory interest tax. The possessory interest tax will raise revenues necessary for the Blackfeet Tribe to provide essential governmental services to all persons, Indian and non-Indian, within the reservation.

The power to levy taxes is an essential part of the authority of any government and is an aspect of retained sovereignty of Indian tribes. Tribal taxing powers have been confirmed in a long line of court decisions. Two of the most important recent decisions are Merrion V. Jicarilla Apache Tribe, 455 U.S. 130 (1982), which upheld a tribal oil and gas severance tax, and Kerr-McGee Corporation v. Navajo Tribe, 471 U.S. 195 (1985), which upheld a tribal possessory interest tax. In the Merrion case, the Supreme Court stated that a tribe's power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." Through the enactment of the Blackfeet Possessory Interest Tax Ordinance, the Blackfeet Tribe is exercising its power as a government to raise money necessary to provide government services to all persons present within the reservation boundaries.

The possessory interest tax applies to only certain kinds of improvements on real property within the reservation. In order to continue the tribal policy of promoting and encouraging the local area economy, while at the same time assuring a predictable sourse of revenue for funding governmental services, Section 11 of the Blackfeet Possessory Interest Tax Ordinance exempts five categories of property improvements from the tax.

Under the Section 11 exemptions, the following are examples of entities and persons who will not be taxed:

- If you have a home within the reservation, the tax does not apply to your home.
- If you are farming or ranching on lands within the Reservation boundaries, the tax does not apply to your farming or ranching activity.
- If you are a businessman operating a commercial business (as defined by the Ordinance) on the reservation, whether it is sales oriented or service oriented, the tax does not apply to that business.
- No property held by the United States, the State of Montana, and county, the town of Browning, or other cities, towns or school districts within the reservation is affected by the tax.
- Utility service lines or distribution facilities which exclusively provide utility services to homes, businesses and public buildings on the reservation are not subject to the tax.

The following are some examples of types of improvements within the reservation, whether on fee, tribal, allotted or government property, which will be subject to the possessory interest tax:

- Railroad lines;
- Telegraph or microwave lines/towers;
- Oil and gas pipelines;
- Telephone lines and electric power lines which do not exclusively service homes, businesses and public buildings on the reservation.
- Oil and gas wells, and wellsite improvements.

Within the next several weeks, the Tax Administration Division of the Blackfeet Department of Revenue will be mailing a copy of the Possessory Interest Tax Ordinance together with taxpayer instruction packets and taxpayer registration and reporting forms to those persons and entities who may have property improvements subject to the possessory interest tax. If you receive this taxpayer information, you should first carefully read the copy of the Ordinance and then fill out the registration and reporting forms provided in the packet.

If you do not receive this information and you are subject to the tax, it is your responsibility as a taxpayer to obtain the appropriate forms, complete them, and return them to the Tax Administration Division within the time-frame set forth in the Ordinance. Taxpayer registration and reporting forms and further information regarding the Blackfeet Possessory Interest Tax may be obtained by contacting the Tax Administration Division, Blackfeet Department of Revenue, P.O. Box 639, Browning, Montana 59417; (406) 338-5525.

AlbuQuerQue Journal 4-21-87

;an Felipe Pueblo Puts 6% Tax on Utility Property

Leah Beth Ward

THE JOURNAL'S CAPITOL BUREAU

ANTA FE — San Felipe Pueblo become the latest Indian govment in New Mexico to tax ities on the value of their prop-/ crossing pueblo land.

an Felipe has enacted a 6 percent ssessory interest tax," said Lt. '. Stanley Tenorio. The tax is on value of any interest in real perty that a utility has within the blo boundaries.

Tenorio said in an interview that there are at least four companies that have been asked to report the value of their property to the pueblo so the tax can be calculated and collected.

They include Public Service Company of New Mexico, Gas Company of New Mexico, Mountain Bell and Plains Electric Generation and Transmission Cooperative. Natural gas pipelines companies and railroads will also be subject to the tax, Tenorio said.

The tax can be passed on to ratepayers as a cost of service.

Most of the properties to be taxed are rights of way owned or leased by utilities for service and distribution lines. Tenorio said an early "conservative estimate" shows there is about $5.4 million worth of utility property crossing the pueblo's land.

The total amount of tax revenues that could be collected by pueblos that have enacted similar ordinances isn't available yet because utilities haven't completed reporting valuations, said Herman Agoyo, chairman of the All-Indian Pueblo Council.

"It's a legitimate way of obtaining additional revenues," Agoyo said on Monday.

Officials from the Albuquerque Bureau of Indian Affairs operations office said on Monday that by early summer, all nine southern pueblos will have a possessory interest tax in place. An informal telephone survey showed that the taxes range from 3 percent in the Navajo Nation to 6 percent in San Felipe.

Many of the eight northern pueblos also are considering the tax, said Joe Garcia, executive director of the Eight Northern Indian Pueblo Council. He said Nambe Pueblo has the tax already.

The use of the tax hasn't sparked many protests, said Karen Griffith an attorney with Nordhaus Haltom Taylor & Taradash in Albuquerque,

MORE: See SAN FELIPE on PAGE A3

San Felipe Pueblo Taxes Utility Property

CONTINUED FROM PAGE A1

a firm that does tax work for Indian tribes.

She said she recalled one situation in which a pipeline company objected to the amount of the tax, but not to the taxing authority of the pueblo. The dispute was settled through the pueblo appeals process, she said.

The Indian right to tax was affirmed by the U.S. Supreme Court in 1985. The Supreme Court upheld a Navajo business tax and a tax similar to the one imposed by San Felipe Pueblo.

Since then, tribes across the country have begun to exercise their taxing authority with several different kinds of taxes, BIA officials said.

The Rio Grande pueblos so far have instituted only the possessory interest tax, although they have the authority to use other types of taxes, such as a sales tax, Griffith said.

Garcia said the recent appearance of the possessory interest tax in New Mexico is only partly related to the pueblos' need to find new revenues to take the place of funds cut by the federal government. "Perhaps depleted federal funds have something to do with it, but I think it's more a means of using the authority they already have," he said.

Utilities don't like paying the new possessory interest tax, but they recognize the tribal right to levy it.

Mountain Bell spokesman Lou Belmont said the company expects to pay more than $100,000 in the possessory interest tax in 1987 to nine southern Rio Grande pueblos. He said Mountain Bell considers the taxing levels to be somewhat arbitrary.

"We have tried to negotiate lower amounts, but it's usually to no avail because they are sovereign nations and they can set whatever standard they choose," Belmont said. "Most of these charges are not fairly based," he said.

Rodger Beimer, spokesman for Plains Electric, a wholesale supplier of electricity to mostly rural electric cooperatives, said the cooperative expects to pay about $30,000 in possessory interest taxes in 1987. "As of April 15, we had seven pueblos notify us of the tax. It seems like we get a new one every day," Beimer said.

Tenorio said San Felipe based its 6 percent tax on its budget needs. But he said the rate could be lowered depending on how the pueblo's budget picture looks at tax collection time.

Griffith said the taxes are neither arbitrary nor excessive. "The state has about five or six different taxes on business, which is way above anything the tribes are doing," she said.

Lee,
We [illegible]
to this. It is
interesting that
the same attorneys
are working
for both Tribes.
Am getting your
info to the
Att. Gen. & to the
Companies listed
in the news
article.
Thanks for keeping
us posted.
Charlotte

Great Falls Tribune Mar 8, 1987

State may sue tribes over fishing rules

KALISPELL (AP) — The state of Montana may sue the Confederated Salish and Kootenai Tribes over proposed hunting and fishing rules for the Flathead Indian Reservation, a state wildlife official said.

"Our main effort right now is court law," said Al Elser, northwest Montana supervisor for the Department of Fish, Wildlife and Parks. "The director is becoming more involved, and is meeting almost daily with attorneys and other agency heads."

The action surprised tribal authorities, according to Fred Matt, a member of the tribal council. He said he thought negotiations had been making steady progress.

"When we left there (Helena) last week, I thought it was still pretty much a working relationship," Matt said.

State and tribal officials have been wrangling over management jurisdiction on the Flathead reservation.

The tribes adopted rules requiring non-tribal members to obtain permits for bird hunting and other recreational activities on the reservation, including lands owned by state and federal agencies.

The state already requires licenses for bird hunting on non-tribal trust lands within the reservation, such as the Ninepipe Wildlife Refuge, and has indicated it plans to ignore the imposition of tribal jurisdiction.

The new tribal rules are scheduled to take effect April 1.

Both Elser and Matt hope the conflict is kept out of the courts.

"No one wins a lawsuit," Elser said. "We still feel pretty strong that we need to sit down and negotiate these things, look at some kind of co-management, co-jurisdiction."

Giving up our citizenship?

Editor:

This is what you sign to receive the new tribal use permit, 44-D. It costs $15 in addition to your state license to fish, plus another $10 to hunt birds, within the exterior boundary of the reservation.

This includes your own patent fee land; the Indians sold this land to the United States government, then you or your predecessor purchased your land from the U.S. government.

Will you please conduct a poll to see how many people are willing to give up their rights as a United States citizen in exchange for this contract?

I hereby apply for a permit to engage in permitted activities on the Confederated Salish and Kootenai Tribes' Reservation and I agree, as partial consideration for the granting of such permit, that the following terms and conditions govern my use of the permit, and my use of Tribal resources and services:

1. I agree to obey all applicable Tribal and Federal laws and regulations and I understand that permission to enter the Federal Reservation is conditioned on my compliance with same. I understand that any violation of such laws and regulations subjects me to Tribal civil penalties and/or any penalties provided by Federal law.

2. I consent to the jurisdiction of the Confederated Salish and Kootenai Tribes over any dispute arising from my use of this Permit.

3. I agree to be bound by the civil sanction provisions of Tribal law in the event that I am found to have violated Tribal law while engaged in permitted activities.

4. I agree to save and hold harmless the Confederated Salish and Kootenai Tribes for any loss, damage or injury to any person or personal property that occurs from or arises out of activities engaged in under this Permit.

5. I understand that certain lands or waters may be closed to entry by the Tribes for the protection of members, permittees, or fish and wildlife without prior notice.

Erlene Robinson
Polson

Tribe is working on business code

Resolution 10A, which created a Blackfeet Tribal business license, seems to be on its way out because it left too many questions unanswered, says Stan Juneau, legislative analyst for the Blackfeet Tribe.

Juneau, who disagreed with a story which appeared in last week's Pioneer Press concerning tribal jurisdiction over non-members (see letter to the editor on page 4 signed by Archie St. Goddard and Lee Wilson of the Blackfeet Tribal Council) said that the tribe currently is working on a business code which exempts activities relating to farming and ranching, schools, public service and religion.

He said the proposed code is "mostly for monitoring" businesses and that the tribe looked at several other tribal, county and city codes.

As for 10A, which was passed but not put into effect, Juneau said it was reviewed once, sent back to the tribe with comments. "It really left a lot of things unanswered."

Juneau said that contrary to what has been said, a survey done in 1984 turned up 76 businesses in Browning, excluding consultants and some contractors. "They're all individual businesses such as the War Bonnet (Restaurant), Circle K, IGA, Legion...."

He noted that in 1970, there were 86 businesses in Browning. "Some of those are no longer here," Juneau said, "but a lot have come in to replace those that left.

He said that from 1970-82, Browning lost 31 businesses but gained 24, for a net loss of seven.

Juneau adds the tribe has met at least a dozen times in the past year with various groups, including county commissioners and the East Slope Taxpayers' Association, to discuss such things.

At about the time the story on jurisdiction appeared in the Pioneer Press, a letter published in the Glacier Reporter from Sen. John Melcher which says "it has always been my opinion that attempting to collect taxes on non-Indians on the reservation would be very harmful, causing harsh feelings, lack of investment and job opportunities on the reservation, and legal cases that would likely cause Congress to limit actions by tribes."

Melcher adds that "there has been reaction of this nature concerning the proposed licensing fee that the Blackfeet Council has adopted. I am greatly concerned that the proposal has already brought not only bad feelings between Indians and non-Indians, but such uncertainty that credit, investment, jobs and success in farming and ranching on the reservation as well as other businesses have been drastically jeopardized."

The senator from Montana asked the tribe "to explain to me the immediate steps ...the Tribal Council has taken to withdraw the damaging proposals."

Melcher, Sen. Max Baucus and Reps. Ron Marlenee and Pat Williams were among the group of people and commissions a contingent from Glacier County visited with on a recent trip to Washington to discuss tribal jurisdiction over non-members and over land owned by individuals (Indian and non-Indian alike) and not in trust for the tribe.

One of the primary concern to the group which travelled to Washington were lack of credit available to farmers, ranchers and businessmen on the reservation since First National Bank of Browning closed its doors last fall; the proposed Resolution 10A which originally called for a $300 license for those businesses on or doing business on the reservation, the creation by the tribe of a land committee which has authority to determine who has last chance to lease tribal lands, and oil and gas taxes and other things required of oil producers which, according to most oilmen, are making it unattractive to do business on the reservation.

page 1

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MONTANA STATE SENATE

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COMMITTEES:
BUSINESS & INDUSTRY
EDUCATION
LABOR
TAXATION

March 6, 1984

TO WHOM IT MAY CONCERN:

My name is Delwyn Gage. I am a State Senator from District #7 in which is located the Blackfeet Indian Reservation. I am also a member of the Select Committee on Indian Affairs for theState of Montana. This committee has had hearings this past year on such matters as cooperative agreements, water issues, delivery of social services to Indian Tribes, taxation of such things as alcohol, cigarettes and gasoline as these taxes apply to programs on the reservations, fish and game matters, and we still have two orthree topics to explore such as natural resource taxation, education and state lands within the reservations.

We also had a review of Tribal Courts during one of our hearings. A professor from the University of Montana Law School gave this review and during the course of that presentation she mentioned the fact that there is very little legislated law covering the dealings with reservations and their governing bodies and the rest of the people of the United States. What we are relying on for guidance in most cases is rules and directives from the Dept. of Interior and Bureau of Indian Affairs and court cases. If you will pardon the expression this is one hell of a mess. When a person wants to know what to do in a particular situation, he is faced with checking through thousands and thousands of rules and regulations from the Dept. of Interior and B.I.A. and then making sure that there is no court case that is in conflict with that rule or regulation. Even then he cannot be sure that there is not another court case that has held contrary to the one he is relying on or that that decision will be upheld in the area where he is residing.

The matter of jurisdiction over Indian Tribes has been left to the Congress of the United States. This body which is supposed to be representing all the people of the United States, Indian and non-Indian as well, has done a lousy job, in fact it has done almost no job at all. The founders of the constitution of this nation were very careful that they built a system of checks and balances into this republic. When it comes to Indian affairs Congress has nearly completely abdicated its share of this responsibility to the Executive and Judicial branches. It is my contention that the Congress is to pass the laws and the Judiciary is to decide as to the constitutionality of those laws and to adjudicate disputes in interpretation of those laws in accordance with congressional intent. We have degenerated to our present situation where law is now of three types, legilative (and when it comes to Indian affairs this type is nearly non-existant), judicial wherein the courts in far too many instances are not just adjudicating but they are construing laws in accordance with their own desires and philosophies, and executive order through either the president or his appointed staff. It is about time the Congress of this country got back to the basic concepts of the founding fathers and took the bull by the horns by regulating the affairs between Indians and non-Indians through the legislative process. This way those who are dealing with these matters could go to a dodified set of laws to determine what their situation is rather than going to the time and expense of hiring legal personell to do the hours of research necessary to guide their decisions.

I took the opportunity to testify before the Federal Commission on Indian Economies at a meeting in Billings recently. A copy of that testimony is attached for your information as it sets out some of the problems which both the Indian and the non-Indian are dealing with out here in the real world.

I do not want you to get the idea that the Indian people are to blame for this mess. As my testimony to the Indian Economies Commission states, we got them into this mess and it is up to us to get them out of it. The State of Montana by its constitution has nearly no jurisdiction on Indian reservations and therefore the solution to jurisdictional matters must come from Congress. We need congress to speak on such matters as jurisdiction over non-Indians on reservations, jurisdiction over fee land owned by non-Indians on reservations, how far in quantity do the reserved rights to water for Indian tribes go, just for starters.

There are many who would like to know what the definition of an Indian is. Many people feel that if a person is 3/4 by blood Irish and 1/4 by blood Indian, that he is more Irish than he is Indian and therefore should lose his identity and rights as an Indian. I realize that there are many more things than blood content which are more influential on the actions and thoughts and values of a person but regardless of that, blood content is one of the easiest ways to determine ancestry and could be a means of setting forth proceedures and laws for qualification to be included on Indian Tribal rolls.

A statement was made by a member of an Indian Tribe at a recent Indian Affairs Committee meeting that the American people did not know what to do with the Indians, Congress evidently did not know what to do with the Indians as it had done nearly nothing in this regard. My comment to the persons present was that I was not sure that the Indian people even knew what to do with the Indians. I challenged those Tribal representatives present to sit down in the next few months and outline for our committee just what they would like to accomplish for the Indian people and where they would like to be as a people 50 to 100 years from now with respect to the rest of society and the United States.

I doubt that we will get any kind of helpful or meaningful response to that challenge but it would surely be helpful to our committee if we knew the intentions of the Indian people for the future.

The Blackfeet nation has been granted the authority to tax the production of oil and gas on their reservation. They have also implemented a business license. There is rumor that they are also contemplating a gross proceeds tax. They have passed a resolution regarding the sale and leasing of land by Indian people on the reservation whereby the land cannot be sold or leased to non-Indians or the person leasing or selling the land will lose his preference rights.

All these things may be legal and even morally right, but they are causing bad feelings between the Indians and non-Indians. Our nations was founded on the basics of equality for all people. There is no question that the Indian people have been given the dirty end of the stick over the years. But all of these regulations to require equal treatment to all are doing nothing but creating more discrimintation and prejudice.

I would ask that Congress be made aware of the desperate need for it to speak out on these problems in behalf of Indian and non-Indian alike. Though neither the Indian or the non-Indian may like what Congress enacts, at least we will all know where we stand and we will have one place to look for that information. We are all faced with jurisdictional uncertainty and as long as this condition exists there will be very little progress in settling the affairs between the Indian people and the non-Indian sector of these United States. Please hear our concerns and exert all the influence you have to getting some action in Congress.

Respectfully submitted,

Delwyn O. Gage
Montana State Senator - DIST. #7

The Big Sky Country

MONTANA STATE SENATE

January 30, 1984

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COMMITTEES:
BUSINESS & INDUSTRY
EDUCATION
LABOR
TAXATION

PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

My name is Delwyn Gage from Cut Bank, Glacier County, Montana. I am a State Senator from Dist. #7 and a member of the State of Montana Special Indian Affairs Committee. I am not here to speak on behalf of that committee but to give my views after reviewing the work of prior and present Montana Special Indian Affairs Committees and from experience in listening to the Indian people and the non-Indian people of our state and particularly those around and on the Blackfeet Reservation which is a part of my Senate district.

The complications in economic activity on the Indian Reservations stem from transactions entered into between Indians and non-Indians both on and off the Reservations. Therefore it is necessary to look at various matters in speaking to the problem which you are charged with investigating. It is my opinion, which is shared by many, that the single most serious impediment to economic developement on the Reservations in Montana, and I suspect the nation, is the uncertainty of jurisdiction. A professor from the University of Montana Law School made a presentation to the Spcial Indian Affairs Committee covering the Tribal Court systems in Montana. She made the comment that there is very little legislative law governing Indian affairs in the United States. Most of the decisions that are being made are made in light of court cases and the rules set forth by the Dept. of Indian Affairs and Dept. of Interior. There is no one place at this time that anyone can go to find out just how a particular matter should be taken care of. In fact you will find that there is even a difference of opinion among the various District Courts in this country over some matters. In order to get any guidance it has become necessary to hire legal firms to research the volumes of court cases in order to give you some type of footing to stand on and even then you may find yourself in court over what you have decided to do. But in that regard this is no different regarding dealings with Indians or non-Indians. One other problem which was pointed out was that there is no uniformity among the tribal courts regarding proceedures or qualifications to practice before these courts. There is also no uniformity in the legal codes of the various tribes. Contrast this with the courts within a state which all operate under the same code and in the same manner, and under the same qualifications for those who practice within and before those courts.

You are probably wondering what this has to do with economic developement of reservations. It is these kinds of uncertainties which deter the non-Indian and in some cases the Indian people themselves from starting business ventures on the reservations.

I have spent about 25 years doing accounting and tax work in the economic area encompassing oil and gas leasing, developement and production. I would like to express to this committee, as I have heretofore done with the Blackfeet Tribal Council, some of the concerns of people involved in the oil and gas industry on the Blackfeet Reservation and what I preceive to be the economic effect of some of the decisions of the Blackfeet Tribal Council. May I make it clear to you that I do not fault the Blackfeet Tribal Council as far as their authority to make these decisions. They were given permission by the governing agency of the U.S. to place a tax on the proceeds from the production of oil and gas on their reservation. I place no blame on them for taking advantage of this authority and in making such assessment, Effective October 1, 1982 and for one tax I understand for the full year of 1982, a tax of approximately 3% has been levied on the proceeds from oil and gas produced on the Blackfeet Reservation. Royalty oil was exempted from these taxes.

In the past several years there have also been decisions made which have increased the royalty burden on the oil and gas produced on the Blackfeet Reservation. Other decisions which I feel have had an adverse effect on the oil and gas economy of the reservation have been a decision to limit the oil and gas leases to a period of 20 years without a provision for extension of the lease for the added period of years so long as oil and gas in economically feasible quantities are produced. These changes I am told were made at a time when the US government had given Indian Tribes permission to enter into leases for as long as 99 years and when the State of Montana had changed their leases from a fixed period of years to a period of years and as long as oil and gas in paying quantities was being produced from the property. It is my understanding that the amount of delay rentals have been increased also. Additional concerns of both those entering into oil and gas leases and those who obtain farm and grazing leases is the burden of obtaining in some instances over 100 signatures of interest owners in order to get a valid lease. There is also concern expressed by people in the oil and gas industry that the Blackfeet Tribe does not have qualified people in their local offices to deal with the complexities of the leasing, exploration and production of oil and gas.

After having presented these concerns to the members of the Tribal Council one of the members asked me if I knew how much of the budget of the Tribe was made up of oil and gas income. I said I did not know but I assumed it was a substantial portion. He said it was about 70% and that their revenue had decreased about 42% from this scource. Though the things I have outlined above are not the sole reason for this drop in revenue, I submit to you that they do have a significant effect.

One of the Council members commented that the tax was only 3%. I have been told by oil and gas operators in Montana that they have wells that are being kept in operation on the basis of just 1/2 of 1% change in revenue or expense. Three percent is 6 times that amount.

For many years the Blackfeet Tribal Council has held oil and gas lease sales at which various tracts of land were put up for bid. There were bids from major companies in the oil and gas industry down to the smallest operators in the surrounding area. These sales have produced huge sums of money for both the Tribe and for individual members of the Tribe. The last few sales have been very unsuccessful and many feel that much of the reason can be attributed to some of the decisions which I have spoken of. Most of the present exploration and developement activity now going on is a result of the promotion of these activities by the members of the Tribal Council and some future planned activity has come about in this same manner. In earlier years this activity was initiated with very little effort on the part of the Tribal Council or the Tribal members, because the people in the oil and gas industry were satisfied with the terms of the leases which there were obtaining on the property on the reservation. Due to the decisions to change these lease terms and conditions there is no longer that wide spread willingness to operate on the Blackfeet Reservation by much of the oil and gas industry.

The only bank in Browning was closed by the Feds a couple of months ago. I have been told that there were 27 jobs lost when the bank closed and that there have been over 50 jobs lost in Browning in the past year. A great deal of the business done in Browning is on a cash basis. When there is no local bank to cash checks it means the Browning labor force must go to neighboring towns to get their checks cashed and naturally they do a share of their shopping while they are out of town. This is creating a very negative economic impact on the businessmen of Browning.

A committee was formed to try to get a group of investors or some investment firm to apply for a charter for a bank in Browning. This committee reported that every group they talked to had one common comment. They were not interested in coming to Browning because of the problems in dealing with the Tribal Courts. Some have laid the blame for the failure of the bank at the door of the Tribal Court but I do not think this is the biggest reason for its failure. I do however feel that there is a negative image regarding the Tribal Court as far as those who do not live on the reservation are concerned and even by some who are members of the Blackfeet Tribe.

Since concern about the Tribal Court has surfaced so strongly in this effort to get another bank in Browning, a committee was formed to review an evaluation report that had been received on the Tribal Court, to review the problems of the Court with the business people of the area and the people working with the court system and make recommendations for changes to strengthen the court. I was asked to serve on this committee.

At the meeting with the Blackfeet Tribal Council at which this committee was formed I made some comments regarding things that I felt should be done with not only the court but with the law and order code of the Tribe. After listening to the Tribal Court review and much testimony regarding the problems in entering into cooperative agreements between the State of Montana and the various Indian Tribes in Montana as a member of the Indian Affairs Committee, I am convinced that many problems could be solved if the Tribes would try to pattern their codes after the Montana codes as closely as possible. If the same proceedures and laws are followed in the various courts on the reservations as are used by the same courts of Montana, it would be very simple for the state courts to accept the court orders of Tribal Courts in many areas.

It was very gratifying to me to hear that in just this past two weeks the Blackfeet Tribal Court was dealing with an involuntary committment matter concerning a full blood Indian person. One of the lawyers from Cut Bank, which is just outside the borders of the Blackfeet Reservation, while working with the Montana Dept. of Social and Rehab. Services legal representatives and with Joe McKay who is a practicing attorney in Browning and a member of the Blackfeet Tribe, prepared all the necessary papers and between these legal resources along with Jackie Parsons who is the Chief Judge of the Tribal Court, the matter was guided through the system just as it would have been in the Disrrict Courts of Montana. The person was turned over to the Public Health Service who in turn contracted with the Montana State Hospital in Boulder for the care and treatment of that person. This is the kind of thing that can happen if the Tribes will adopt and conform to the state rules and codes.

The laws of the State of Montana provide for the various agencies of the state to enter into cooperative agreements with the Indian Tribes located in Montana. However one of the provisions is that the authority of the Tribe and the State can neither be diminished nor expanded by the terms of the agreement. This makes that law nearly unworkable in most cases and thus there are very few cooperative ageements that have been negotiated. I am sure one of the aims of the Indian Affairs Committee is going to be to work with the U.S. government in order to make a recommendation to the state legislature for a more workable law in this area.

You are perhaps wondering what this has to do with economic developement on the reservations. It all goes back to the perception that non-Indians have of the complex problems faced when dealing with the Indian people on the reservation and the lack of faith in the Tribal Court system. It is my understanding that the reason the U.S. Gov't allowed non-Indians to come onto the reservations and acquire land and property and establish businesses was to aid the Indian people in the economic developement of the reservations. If this economic developement is to be strengthened and encouraged it will be necessary to establish through congressional action a legal code which will leave no doubt as to jurisdictional matters and which will set forth some type of uniform legal code and proceedures for tribal courts.

Many of the non-Indian people living on the reservations in our state feel that they are in the same situation that the people of the original colonies of this country found themselves in. As you will recall one of the reasons given for the Revolutionary War was taxation without representation. The non-Indians on the reservations are now finding they are being faced with taxation and licensing regulations by councils and governing bodies which have been elected to govern the affairs of the reservation but they did not qualify to vote for these people. This is another concern of those who contemplate any economic endeavor on a reservation.

Many people of Montana and I am sure throughout the nation have expressed concern over the determination of who is an Indian. I do not know if congress has given an answer to that question or not. Many feel that when a person has passed 1/2 blood relationship that a person is more something else than he is Indian. I am sure that you realize as I do that there are much more significant things to consider in making that determination than blood relationship as this has little to do with the mode of life, spiritual and cultural beleifs and moral standards of any group of people. However it is a concern to people when they are dealing with people who are perhaps 1/8th Indian blood and they exercise preferential rights of one type or another. This again is a concern to those who may contemplate business ventures on a reservation.

Another deterent to persuading people to locate their ventures on or near a reservation is the tax situation. Much of the trust and tribal property as well as the income of Tribal members is not subject to various taxes of the state and counties. Without an in lieu payment of some type by the Federal government to make up for the loss of revenue from these sources, the balance of the taxpaying people must pick up a larger share of the tax load.

I do not know that this is true but I have been told that Senator Mike Mansfield, a former congressman from Montana and now U.S. Ambassador to Japan once made the statement that treaties are not forever. Even if he did not say it, I beleive that statement to be true. It is my feeling that the original purpose of establishing Indian Reservations was for the protection of both the Indian and the non-Indian and to provide an area of land where the Indian people could stay together to be helped to adapt to a non-Indian society and economy. That goal as far as economic adaptation is concerned certainly has not been met and is the reason for your commission. I feel that we are doing an injustice to the Indian people by continuing this reservation concept and since we got them into this mess it is up to us to get them out of it. The pledge of allegiance to this country speaks of one nation. That concept seems much more sensable to me than a recent [illegible] recommendation by a congressional committee which proposed that the congress make sovereign nations of each reservation. The citizens of Montana under this recommendation would have 7 foreign nations within the exterior borders of our state.

There is no doubt in my mind that the Indian people of this country have been kicked from pillar to post by others in this nation which includes many governmental officials through the unwise and many times selfish use of the authority of their positions. We have now passed laws in this country regarding descriminatory practices and setting up preferences for various classes and groups of people. The big problem with this is that when you give a preference to one group you automatically discriminate against someone who is not a part of that group. The Indian people understand discrimination very well as they have lived with it since the 1600's. Discrimination is born of prejudice and no one in the world up to this time has found a way to successfully legislate against prejudice.

I will not go into the areas which the Tribes of Montana have been successful in economic endeavors as I am sure others who are much closer to these developements and ventures will testify about these.

It is my conviction that the U.S. Congress has been extremely derelict in its duties regarding the developement of the Indian people within the United States and they have left this duty to the courts of this land. That is wrong as the purpose of the courts is to insure that the laws are administered and upheld in accordance with congressional intent. I have two alternate suggestions for your consideration in making recommendations regarding reservations. My first suggestion is a long term solution but it is better than no solution at all, which is what we have had since the founding fathers drafted our constitution. I propose that congress pass a law which sets forth the quantity of blood relationship a person must have in order to be enrolled as a member of an Indian Tribe. I would not be concerned with the figure used as for instance anything from less than a half down to 1/16th. Over a period of years there would be no people who could qualify as tribal members and without tribal members there would be no need for reservations and they could be dissolved in some manner or other.

The other suggestion which I have would be for the U.S. Government to appropriate sufficient funds to purchase all real property within the exterior boundarias of Indian Reservations that is not owned by either the Tribe or an enrolled member of that tribe. Perhaps rather than giving 8 or 9 billion dollars to Central and South America as has been recommended by Mr. Kissinger, that money could be used for such a program. The people who receive these funds would be given the choice of paying tax on any gain on this transfer or investing these funds in like kind property off the reservation. The property so acquired by the U.S. Government would be given back to the Indian Tribe or held in trust for them with the further stipulation that no one except the Tribe or an enrolled member could acquire real property ownership on the reservations. The Tribes could then deal with only their own tribal members and would have complete jurisdiction insofar as their members are concerned.

The solution to these problems must come from the Congress of the United States who has been charged with the responsibility for the Indian people. The constitution of the State of Montana sets forth under article one that all lands owned or held by any Indian or Indian Tribes shall remain under the absolute jurisdiction and controll of the Congress of the United States etc. Hence it is my contention that there is very little that the executive, judicial and legislative bodies of Montana can do to solve these complex problems except to try to work as cooperatively as we can with the various Indian Tribes to tackle as many of these mutually burdensome problems as we can."

Thank you for coming to Montana and for the opportunity to present this view to ,your commission.

MEMORANDUM

TO: FRED JOHNSON

FROM: SELDEN S. FRISBEE ATT'Y.

DATE: March 12, 1987

Just to outline the conversations with you very briefly, the following is my position.

By the approval of the possessory tax on the Blackfeet Indian Reservation, the United States of America has, in effect, placed in the hands of the Indians the power to discriminate against, and destroy, the non-Indian businesses on the Reservation.

The existence of this possessory tax, even though it may not be exercised against the non-Indians on the Reservations, alone and of itself destroys the value of non-Indian holdings on the Reservation.

By approval of this ordinance authorizing the levying of the possessory tax, the United States of America has deprived the non-Indian fee patent land owner on the Reservation of his property, in just the same way as though it had gone in and confiscated, or condemned, that property.

Accordingly, it is my opinion that if the possessory tax is approved, the United States Congress had better be prepared to pay to the non-Indian, and fee patent land owners on the Reservation, the fair market value of their holdings on the Reservation, including all assets of any nature whatsoever.

If the Congress is not prepared to make such an appropriation, then and in that event I believe that numerous lawsuits will be brought in federal court, or perhaps a class action in federal court, for the recovery by the persons injured of damages which they suffer at the hands of the United States of America.

SYNOPSIS OF MINUTES TO INDIAN TAX REFERENDUM MEETING
by Richard Cassutt, Secretary of meeting

The meeting, as per attached minutes, was well attended by ranchers, local business men (Browning), and commissioners and ranchers from other areas of Montana and one from a Wyoming ranch. The BNRR was well represented but only a representative from FLB-PCA represented the banking fraternity. None of the utilities were present. A representative of the Mont. Dept of Revenue was present and indicated the state has no interest in resisting Indian taxing rights.

The meeting was called to marshall opposition to the proposed Blackfeet Tribal ordinance to tax businesses and properties on the reservation owned by non Indians. It was well established by knowledgeable people present that under present laws they have the power and backing to institute any tax they may desire with the encouragement of the federal government. Brought out that though congress did not specifically intend to confiscate non Indian properties on the reservations, the federal courts have interpreted the laws in nearly every case in favor of no rights for non Indians. Congressional delegations are under pressure from minorities and will not take a negative stand on Indian rights and so called soverignity. The Wheeler Howard Act of 1935 is interpreted by the courts and Department of Interior to give tribal councils full rights to tax and no restraints nor accountability for how tax moneys are used.

The meeting was called to enlist support for a resolution calling for enforcement of constitutional guarantees of no taxation without representation nor application of tax money for other than services to those taxed.

The consensus was there is only one possible way to avert confisicatory taxes from reservation officials and that is by congressional action. This will be extremely difficult--requiring high powered attorneys and lobbyists and such action must be funded by the private business sector. Small organizations have proven to be only a nusiance to congressmen and problems have developed to even get audience with said members. An attempt will be made to get the National Association of Counties to endorse the proposed resolution attached and efforts will be made to enlist big businesses who operate on the various reservations to use their power and financial clout to get congressional action in enforcing the guarantees provided by the United States Constitution.

Under present conditions, non Indian operators on reservations are seeing their resources and property values depreciating rapidly as outsiders will no longer invest in reservation properties and tribal members have stated in public meetings they don't need to buy the properties as they will confiscate them through taxation.

The Blackfeet Tribe has drawn up a Comprehensive Tax Code including rights to confiscate properties and expell from the reservation any who refuse to pay the assessments. Secretary of the Interior Hodel has indicated that Code will be signed by him and will constitute full authority for the tribe to institute taxation without restraint as they see fit giving them full sovreignity over any who reside within reservation boundaries and effectively denying those non Indians any rights or protection under the United States Constitution.

ROSTER OF ATTENDEES AT CUT BANK INDIAN TAX REFERENDUM MEETING

Name	Address	Representing
Richard Cassutt	Ft. Benton, Mt	Land owner, RE Broker
Donnalee Schwend	Hardin, Mt.	Ls.Agt. Campbell Farms Corp.
Ken Wineland	"	Campbell Farms Corp
Jack Butorac	"	Graham Stanton Inc.
Jack Murray	Ft. Smith, Mt.	Campbell Farms Inc.
Alvin K. Torske	Hardin, Mt.	Big Horn Co.
Douglas Freeman	"	Self (atty.)
Brad Spear	Dayton, Wyo.	Padlock Ranch Co.
James Curry	Valier, Mt.	Refrigeration
Dan Bucks	Helena, Mt.	Mt. Dept. Rev.
Wm. Big Springs	East Glacier, Mt.	Rancher
Sarah Fullerton	Babb, Mt.	Chief Mt. Honey Co.
Jim Halverson	Wolf Point, Mt.	Co. Comm. Roos. Cty.
Gordon Morris	Helena, Mt.	Mt. Assn. Ctys
Hale Jeffers	Lodge Grass, Mt.	Rancher
John Omsberg	Cut Bank, Mt.	BN RR Rep.
Larry S. Brownell	Conrad, Mt.	Farm Credit Servs.
Jerry Swenson	Cut Bank, Mt.	Rancher
Kay Hoyt	Browning, Mt.	Businessman
Charles W. Cooper	Cut Bank, Mt.	Farmer
Ed Miller	Big Horn County	Co. Commissioner
Larry E. Bullard	East Glacier, Mt.	Glacier Park Inc.
Arley Holliffe	Cut Bank, Mt.	Farmer
Clinton R. Pilgerim	East Glacier, Mt.	Co. Comm. Gl. Cty.
Fred R. Johnson	Browning, Mt.	" " Rancher

There were perhaps twenty more who came in late and did not sign. Apologies for misspelled names. Many were late because of a funeral. This writer recognized among them:

Al and Pat Lee	Browning, Mt.	Business
Neil Johnson	"	Rancher

Late arrivals who participated in the discussion:

Lester, Ruth Johnson	St. Marys, Mt.	Business
Del Gage	Cut Bank, Mt	CPA
? Pollack	?	
Jim Nelson	Cut Bank, Mt.	Cty. Atty. Gl. Cty.
Ford Hughes	"	Business
Pat Kind	Havre, Mt.	BNRR Supt.
? Bush	?	BN RR
??		"

MINUTES OF CUT BANK MEETING ON INDIAN TAX REFERENDUM

Meeting took place at Cut Bank, Montana voting center. Those attending included accompanying signed list plus perhaps 15 or twenty others who came late and did not sign.

Called to order by Fred R. Johnson at 1:05 P.M. April 15, 1986. Those in attendence were introduced and their business interests identified.

Fred Johnson introduced the proposed resolution by National Association of Counties opposing and deeming unconstitutional : 1. taxation without representation, 2. Election of government officials not subject to the laws or taxes imposed by the governmental body, 3. tax revenues for any purpose except service of those taxed. (A copy of this resolution is a part of these minutes).

Johnson stated he was in Washington D. C. within the last six weeks meeting with Montana Senators, Representatives and members of the Department of the Interior. Results of the meetings were minimal. Sen. Melcher did write the Blackfeet Tribal Council to forestall their planned imposition of a tax, then slated to be instituted March 15, 1986. Johnson anticipates tribe will wait until after council election in June 1986 to pursue their new tax code.

Johnson and others met with Secretary of the Interior Hodel in Denver, Colorado in March 1986 for several hours discussing the taxation problem. Hodel stated the tax is legal and he would be required to sign it as things now stand. To institute the tax the tribe needs to have half of the members of the tribe agree to the tax bill, it must be signed by the Billings, Montana Indian office and the Secretary of the Interior.

Johnson stated the Wheeler Howard Bill of 1935 gives authority and this bill overrides all state and federal power on the reservations.

Johnson stated the purpose of meeting was to decide if those doing business on the Indian Reservations of the United States could live with the unlimited right to tax their properties without representation. He stated Glacier County puts all tax money received from the reservation back into the reservation schools, roads, welfare and other services. He stated the tribes are being encouraged by the Federal Government to generate taxes in lieu of grants from the government. He stated he met with Governer Ted Schwinden of Montana who was unable to attend but sent a representative from the state tax department whom he introduced.

Dan Bucks (sp?): Stated there is no doubt the tribes have legal authority to assess and collect taxes as they choose according to the State Attorney General's Office. At present their code as applied with the state covers only liquor, cigarettes and store licenses. The Blackfeet Tribal Council is presently discussing with the state a plan to coordinate tax collecting with the state on cigarettes, liquor and motor fuel. He stated the state had no objections and that precedence was established in other states taxing on a comparable off reservation basis, an off reservation rate and an agreed percentage of sharing. He stated the state revenue office is interested in coordinating with the tribe on oil production and revenue taxes. He stated South Dakota reservation(s?) have instituted a tribal sales tax. He stated a store license is more than a tax, it is a regulatory mechanism.

Bill Big Springs: Read a portion of the Wheeler Howard act instituted December 13, 1935, emphasising constitutional by-laws giving the tribal council the "right to regulate and license all businesses on reservations and making all non members of the tribe subject to the Secretary of the Interior.

Doug Freeman: What prevents expansion of taxes by the tribe?

Bucks: Doesn't know of any federal limits--perhaps subject to the Department of the Interior.

Freeman: If the state enters into agency with the tribe will the state reduce their tax income.

Bucks: Yes, probably. There will be some state gain in cigarettes and a loss in liquor. Doubts if tribe can succede with motor fuel tax. Oil and gas tax if coordinated with the state might be a loss of revenue to state but would reduce present litigation. Not clear how the US Supreme Court would decide (Crow Case)-would be a loss of revenue only if the court found claim valid.

Freeman: The proposed tribal resolution is only a tax on non members.

? Pollack: In Nebraska there was a test case that ruled tribes are not Soverign but the ruling seems to be ignored. There is another test case to see if they themselves are soverign or just their laws. If they are soverign they should be taxed as aliens off the reservations and loose their vote. Soverignity goes both ways.
F. Johnson: Secretary Hodel says it legal for them to tax everything without regulation. What do you taxpayers want to do? Wait and face it ? There is a test case in California saying it is a double tax. Taxpayers must decide.

Kay Hoyt.. County and state will loose their tax rights.

F. Johnson: Hodel says thats right. Glacier County spends all the reservation tax money back on the reservation. 2.8 million dollars in school funds alone beside fire, roads, welfare and other services.

Big Springs: If it happens the federal government will kill all grants. In a April 3, 1986 Great Falls Tribune article it stated the U. S. Constitution stops at the border of a reservation. Only case in American history where a conquored nation retains their soverignity. Hodel says when the tax code is signed it is a blank check to tax. The tribal council is not accountable to anyone for taking taxes or where or how they spend it according to the Wheeler Howard Act.

Jim Nelson--Glacier County Attorney: Agrees federal case law says tribes have the power to tax. The constitution doesn't exist on a reservation--the civil rights laws covered the Indians and the state is preempted of tribal taxes. Stated complaintants are going the wrong way--meeting and prayer won't help. Only solution is to go to Congress and get the law changed. No possibility of winning court cases ever. Courts have found in favor of tribes in every case. Tribal courts are assessing and collecting fines from non members and courts have found Indians can back out of a contract. Going to be a tough case. ACLU, bleeding hearts, sit on congress's door step. Only heavy legal pressure will work. You will need great quantities of money, high powered lobbiests and big name lawyers.

Big Springs: Its true, tribes puts lots of money into lobbying.

Les Johnson: Hundreds of little organizations around the nation won't work together and have accomplished nothing.

Jim Halverson: Agrees with Nelson. Indians pay no tax on land, cigarettes or liquor. A license on business is a mere tax. $5. this year $5000. next year. Counties have fought Indian taxes for year. The State won't help you-they have enough tax sources so they don't even know the reservations are there. We need to form a major organization. Where are the bankers, Business men and Railroads--they have high power attorneys and lobbyists. The legislators in Washington are sick of seeing the little guys--it must be done by business associations, county commissioner associations and legal associations. Only Congress can change the law. If you get a notice of licence or tax bill --refuse to pay it. If you pay the first bill you have agreed to pay all the rest. Ranchers will be the last to be taxed.

Dick Cassutt: I have a fist full of patents issued in the name of the US Congress don't I have some protection?

Nelson: They aren't worth two bits. The courts have taken the power of congress by interpretation and congress won't look.

F. Johnson called on:

John Omsberg-BNRR: Stated he was only a listener but thinks the Railroad will help out.

Larry Bullard--Greyhound: Just came to listen.

Larry Brownell--FLB PCA: Concerned if property tax on reservation land is instituted. Agrees none should pay the tax on real property if assessed.

Big Springs: Tribe has the authority to collect. They expelled the curator of the museum --took him to the reservation boundry and told him not to come back and it was backed by the BIA.

Freeman: Number one thing is to get congress to act. Only time

Congress helped was in Maine when the Indians tried to confiscate all land from white men on reservations there. We need big help and big money. Law and order Indian act did get stopped on the Crow Reservation. US Supreme Court did say the Indians had no Jurisdiction on non members. Water Cases are being fought in state courts. The Indians say if we can tax non members on the reservation we can tax him off!

Bucks: The Blackfeet Constitution says the codes are subject to the Secretary of the Interior.

Big Springs: Sec. Hodel encouraged the Indians to impose a 1% tax.

Nelson: The administration is encouraging Indians to get revenue somewhere i.e. tax. Melcher, in effect, said "White man move!"

Big Springs: The Constitution is still the greatest authority. We need help from Business, Railroads, Sportsmen and the big outfits.

Bucks: Do what you need to do with congress. The state intends to avoid layers of tax. Direct tax on real property on reservations stems from the allotment of 1887 and 1907 when congress authorized state and local governments to tax fee lands. State and county has specific fundamental authority in the law to tax real estate. Tribal members say they see the concern. Layers of tax would cause many problems.

Nelson: The General Allottment Act gives the right to tax fee land.

F. Johnson: Going to Las Vegas County Commissioner's meeting in July. Melcher says there will be 25 senators there.

Halverson: National Association of Commissioners won't help. Too many of them don't have the problem. We need to use the private sector.

F. Johnson: Worked on this problem for eight years. No one pays any attention. Can't seem to get anything going. Did get Melcher to stall the 3/17/86 enactment of the tax law. At the July 1, 1986 meeting in Las Vegas, the tax resolution should help. We are fighting taxation without representation. Even foreign nations eventually accept everyone as a citizen and they have to live under their laws.

Jerry Swenson: Mail a copy to BN and Greyhound--make them respond. It's either now or wait until the tax is collected.

Nelson: Gather money and hire a lobbyist. Buy a congressman.

Hoyt: We need big oil and the big companies.

Big Springs: Metcalf said "Treaties are not forever!"

Jack Murry: Let's hire a lobbyist. I'll kick in the first $1000.

Kind: yes. / Johnson gave brief resumé of proceedings.

Kind: We came to see the tribal proposal and find out what effect it will have.

F. Johnson: Once they get started they will have no restraint. They are not accountable for funds and have the encouragement of the federal government.

Kind: Our attorneys are not sure of what the Indians are saying. Today we came to listen, not to take a position.

Halverson: (to Kind) The association of counties has tried to stop these taxes for years. We now feel the private sector has to get in. If tribes get their way your railroad will be the the biggest taxpayer in the US. The present concern is over a business license--it is a tax that will lead to more tax. If you pay $5. once then it can jump to any size. Whose court do you go to? The tribal court is owned by the council and there is no stopping them. We are asking for support from industry. The railroads have lawyers and lobbyists--we need them. Right now we ask for a letter of support from your railroad to us. A few hundred thousand now will be darn cheap compared to what it will be. The first tax is always against those with big bucks--your problems with Montana State will be nothing compared to what might come with the various tribes.

Big Springs: The railroad already has trouble with ties and rails.

Kind: We have continuous problems.

F. Johnson: This needs to be done very soon or it may be too late. Take this resolution to your attorneys. We may need to file suit with the federal government to stop the one percent tax.

Big Springs: We need your lobbyists help--the tribe has theirs.

F. Johnson: Send letters to my office as commissioner. I'll send copies of them to our senators, etc.

Freeman: How about to the legislative commision.

Gage: A resolution won't go through as proven by past history but I'll introduce one at the special session.

Meeting adjourned by Fred Johnson.

Gordon Morris: Nelson states the case very well. There are 3500 counties that are members of the association. Get them to agree and they carry a big message to congress. Asks Bucks--any similar cases?

Bucks: Yes in south and North Dakota. Tribes adopt a share of the taxes. Says there is no sign of escallation of taxes--the general fear is of escal.

Les Johnson: Thats proven with Blackfeet fishing licenses. Started with $2. Now its $30. and tax on fishing huts and fees to enter etc.

Morris: Then lets get the association going on it.

Halverson: Schwinden's farm is on the reservation.

F. Johnson: Probably the tribe wont institute the tax until fall. Lets get the commissioner's association together and see what they can do. Asked how many could live with the INdian tax--no response. Asked how many were afraid of it--all raised their hands.

Neil Johnson: Take money from taxes and hire a lobbyist. Say 2% of taxes.

Morris: can do that only by voted authority--you need a petition.

Miller: Do states with these problems meet with other states? Like Washington, and the Dakotas. If the American Indian Movement is still active those sates may help us. If we can find a senator from a state without reservations to introduce the bill in congress it might carry the ball.

Gage: Other states have minorities too and they are touchy--minorities control congressional seats.

Pilgerim: We are told we are anti-Indian. Thats not true we are only worried about survival. Racism is not the problem--the problem is money.

Halverson: Our problem is Government and System, not our neighbors. We need letter from banks, RRs, utilities and government associations immediately. Private individuals can help later.

Kay Hoyt: Moved Fred Johnson take resolution under discussion to Las Vegas and all locals write letters of support.

F. Johnson: Get me letters from Banks and big business--I'll send them to Hodel --need them NOW!

Representatives from the Burlington Northern Railroad came in at this time 2:45.

F. Johnson: Did you railroad people read this tax ordinance?

PROPOSED RESOLUTION

WHEREAS, it is a fundamental principle of the Constitution and government of the United States and its various states that any laws or regulations to which citizens shall be subject, or any taxes which citizens shall be required to pay, shall be imposed only by governmental officials elected by those upon whom the laws and taxes are imposed; and

WHEREAS, those who are elected to carry out the functions of government, including taxation, must be representative of the people by whom they are elected, and must be subject to the laws and regulations which are enacted; and

WHEREAS, the imposition of any taxes must be based upon the services to be rendered to the citizens upon whom the tax is imposed.

Now, therefore, be it hereby RESOLVED, that the National Association of Counties is firmly opposed to, and deems to be unconstitutional:

(1) any law or court decision which would allow any government to impose taxes or other laws or regulations of any nature when any of those upon whom the laws or taxes are imposed have no right to elect the governmental officials who impose those laws or taxes;

(2) any law or court decision which would authorize the election of governmental officials who would not be subject to the laws or taxes imposed by the governmental body; and

(3) any law or court decision which would permit tax revenues to be used for any purpose except to provide services to those upon whom the taxes are imposed.

Dennis L. Draney
Duchesne County Attorney
Box 206
Duchesne, Utah 84021

Indian taxes just beginning

By LINDA CARICABURU
Tribune Regional Editor

News analysis

In the last two months, tribal governments on three Indian reservations in Montana have announced plans to impose new taxes within their boundaries.

Indian officials on and off the reservations say the new taxes are just the beginning of a movement by tribes to increase revenue and assert their independence as government entities.

Those who must pay the taxes — primarily railroads, utilities and natural resource companies — however, complain they are being subjected to double taxation, taxation without representation and discrimination. The court challenges promised by these companies may be ineffective, though, as the U.S. Supreme Court has upheld several similar taxes on other reservations in the country.

The new wave in Indian taxation is not unique to Montana, but rather is part of a national trend of tribal governments seeking to raise funds for financially strapped programs. As the movement grows across the country, it also grows in Montana.

So far, the Fort Peck tribe in Poplar has passed and implemented a 3 percent tax on the utilities on trust lands within the reservation. At least seven utilities and Burlington Northern Railroad are among those affected.

The Blackfeet Tribal Business Council in Browning has passed a 4 percent tax on all property and possessions of utilities, railroads, oil and gas operations and microwave transmissions on the reservation that don't exclusively serve the reservation. That tax is currently being reviewed for final approval by the Bureau of Indian Affairs.

Last week, the Crow tribal council at Crow Agency announced a three-pronged tax on business, agriculture and income. The tax would include a $1 per acre per year property tax on the more than 1 million acres leased for agriculture and oil and gas exploration. Also part of the package are an 8 percent severance tax on oil and gas and a 3 percent income tax on all people working on the reservation. A Crow spokesman said there will be a hearing this month on the proposal and that they hope to have the tax in place by the end of the year.

"What you're seeing is an exercise in the sovreignty of tribal governments," explained Richard Real Bird, Crow tribal chairman. "I think it's the trend across Indian country. To be sovreign, we have to be eco-

See INDIAN, 2A

Indian

nomically sovreign."

Bill Haltom, a New Mexico attorney whose law firm has represented several tribes in getting such taxes implemented, agreed the surge in tribal taxation is part of a national trend. Haltom said it has been brought on, at least in part, by what he calls a strong mandate from Congress to the tribes that they "begin to act like governments and stand on their own."

Haltom said Congress thinks tribal governments should be seen as "on a par" with state governments and should take on similar responsibilities in caring for their people. "The only way to do that is to emulate what other governments do," he said. "And what other governments do is impose taxes."

Tribal officials say the money they raise will be used to provide essential services: tribal courts, community colleges, road building, drug and alcohol programs and child services. Among the reasons they give for needing the money are a tightening of the federal budget, with fewer dollars for Indian services, better social services for their communities and an increase in the number of people returning to the reservations.

Eloise Cobell, finance officer for the Blackfeet tribe, said the federal government has a trust responsibility to provide education, health services and economic development on the reservations. She said the government has reneged on this responsibility, leaving the tribes to provide for the people.

"Somebody has to pick up the pieces and it looks like it's going to have to be the tribes," Cobell said. "The need for all these services is still there, so people can scream and yell all they want about these taxes, but I think they're here to stay."

Though only three of the state's tribal governments have announced plans for new taxes, the state's coordinator of Indian affairs, Donald "Louie" Clayborn, said the other four reservations are considering similar proposals.

"Indian people do not want to be on welfare; Indian people do not want to rely on federal dollars for everything," Clayborn said. "We see these taxes as a way for the tribes to finally become self-determinate."

Attorney Haltom admitted there is a "legitimate problem" of dual taxation when tribes begin taxing on reservations. But he said the problem lies with the state or county, not the tribes. He said if a tribe is providing services where a state is not, perhaps the tribe should receive tax revenue instead of the state. "It's a fairness issue," he contended.

Clayborn said that "on the surface" it may appear that new taxes will inhibit economic development on reservations, but asserted that is a shallow argument.

"That's an argument made in all facets of government by Indians and non-Indians alike who are fighting taxes," he said. He said the better roads, police protection and other services being provided by the taxes will actually make the reservations look more attractive to developers.

And Clayborn quickly dismissed the complaint of taxation without representation: "The fact remains that non-Indian people choose to live on reservations. The bottom line is, if they don't like it, they can leave the reservations."

Other tribal officials say that any person — Indian or non-Indian — who feels discriminated against or unfairly singled out by the taxes may appeal through the tribal court system.

In the meantime, the tribes of Montana are taking close looks at their taxing options. The consensus is that within the next year or two, all seven reservations in the state will try to implement one of the options.

Those whose pocketbooks are affected may have little choice but to work with the tribes for a fair tax structure or mount what may be an expensive fight in the courts. Or, as Clayborn said, they may leave the reservation.

Tribe is working on business code

Resolution 10A, which created a Blackfeet Tribal business license, seems to be on its way out because it left too many questions unanswered, says Stan Juneau, legislative analyst for the Blackfeet Tribe.

Juneau, who disagreed with a story which appeared in last week's Pioneer Press concerning tribal jurisdiction over non-members (see letter to the editor on page 4 signed by Archie St. Goddard and Lee Wilson of the Blackfeet Tribal Council) said that the tribe currently is working on a business code which exempts activities relating to farming and ranching, schools, public service and religion.

He said the proposed code is "mostly for monitoring" businesses and that the tribe looked at several other tribal, county and city codes.

As for 10A, which was passed but not put into effect, Juneau said it was reviewed once, sent back to the tribe with comments. "It really left a lot of things unanswered."

Juneau said that contrary to what has been said, a survey done in 1984 turned up 76 businesses in Browning, excluding consultants and some contractors. "They're all individual businesses such as the War Bonnet (Restaurant), Circle K, IGA, Legion...." THEIR SURVEYS NEVER MATCH OURS!

He noted that in 1970, there were 86 businesses in Browning. "Some of those are no longer here," Juneau said, "but a lot have come in to replace those that left.

He said that from 1970-82, Browning lost 31 businesses but gained 24, for a net loss of seven. THEY WENT BROKE IN 2 YES

Juneau adds the tribe has met at least a dozen times in the past year with various groups, including county commissioners and the East Slope Taxpayers' Association, to discuss such things.

At about the time the story on jurisdiction appeared in the Pioneer Press, a letter published in the Glacier Reporter from Sen. John Melcher which says "it has always been my opinion that attempting to collect taxes on non-Indians on the reservation would be very harmful, causing harsh feelings, lack of investment and job opportunities on the reservation, and legal cases that would likely cause Congress to limit actions by tribes."

Melcher adds that "there has been reaction of this nature concerning the proposed licensing fee that the Blackfeet Council has adopted. I am greatly concerned that the proposal has already brought not only bad feelings between Indians and non-Indians, but such uncertainty that credit, investment, jobs and success in farming and ranching on the reservation as well as other businesses have been drastically jeopardized."

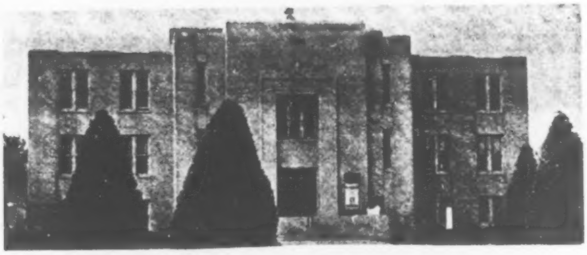
The senator from Montana asked the tribe "to explain to me the immediate steps ...the Tribal Council has taken to withdraw the damaging proposals."

Melcher, Sen. Max Baucus and Reps. Ron Marlenee and Pat Williams were among the group of people and commissions a contingent from Glacier County visited with on a recent trip to Washington to discuss tribal jurisdiction over non-members and over land owned by individuals (Indian and non-Indian alike) and not in trust for the tribe.

One of the primary concern to the group which travelled to Washington were lack of credit available to farmers, ranchers and businessmen on the reservation since First National Bank of Browning closed its doors last fall; the proposed Resolution 10A which originally called for a $300 license for those businesses on or doing business on the reservation, the creation by the tribe of a land committee which has authority to determine who has last chance to lease tribal lands, and oil and gas taxes and other things required of oil producers which, according to most oilmen, are making it unattractive to do business on the reservation.

This statement is a lie! We had meetings supposedly with the Tribal Council, but Juneau and one male persons plus a secretary would show up with a pre-typed agenda of things we (County & ESTA) should do for the Indians — Never, ever, discussing our problems.

LJ



GLACIER COUNTY
CUT BANK, MONTANA

December 31, 1985

Dear Congressman:

The Blackfeet Tribe is back to taxing the taxpayers of Glacier County. The County, State and Federal is already taxing us.

The Tribe seems to think they are another nation. They are putting all their land back into trust so they are not a taxpayer.

My taxes have doubled since 1983. I paid $8,600 taxes then and now my taxes are $16,940 so you can see what is going on. I do not see how the taxpayer can pay anymore. The taxpayer is already paying for their own services on the Reservation. We are receiving nothing in the way of services from the tribe. What can be done to prevent this unfair burden on the taxpayer. The tribe can tax their own people if they want to, we cannot tax them.

If the tribe has this jurisdiction how can the State still tax the taxpayer?

We can have only one government in the U. S. A.

Enclosed is the tax code of the tribe.

Please let me know your thoughts on this problem.

All taxpayers are clearly very much concerned.

VOTE YES SB1093

Fred R. Johnson

Fred R. Johnson - Glacier County Commissioner lca
Special Committee on Indian Affairs

WE NEED THE 2 YEAR MORATORIUM!
NOW TAXES ARE EVEN HIGHER
WITH MORE RAISES FORCASTED.—
WAKE UP— OR THE TAX PAYERS
WILL REALLY REVOLT! F.J.

Blackfeet mentioned in Phoenix paper

Oct/14/1987 Glacier Reporter

Editor's Note: The following article is reprinted with permission from the October 8, 1987, edition of the Arizona Republic of Phoenix, Arizona. It was one part of an eight-part series, "Fraud in Indian Country, A billion-dollar betrayal".

By Chuck Cooke,
Mike Masterson
and M.N. Trahant

Browning, Mont. -- Just about everyone here has a story about the toughness of this Blackfeet Reservation town.

Browning is so tough that when a pistol-packing robber walked into a local saloon, a customer grabbed and held him while the bartender shot the startled bandit twice in the chest with a .44-caliber Magnum.

It is so tough that a tribal policeman who went out to quell a drunken disturbance was killed by fellow Indians, who tied him up with a rope, dragged him five miles behind a galloping horse and then castrated him.

"Around here, people get drunk, rape, shoot and murder," said Kenneth Morsette, an investigator for the Bureau of Indian Affairs police on the Blackfeet Reservation.

"And, if I could steal a guided missile, I could fence it here in Browning at the local dope dealer."

But the toughness and lawlessness of the town of 3,500 is wearing thin on many Blackfeet who have become crime victims. They are upset that many criminals are not being prosecuted.

And because criminals are not jailed, Browning residents worry that the people they meet at the grocery store or the Browning Town Pump convenience store may be rapists and murderers who have never paid the price for their crimes.

"We have people walking the streets who have done major crimes," Morsette said. "They may get away once, but we'll get them eventually. They always get cocky and do something else."

The BIA investigator's frustration with crime in Browning is echoed by other police officers, Tribal Court judges and citizens. They are fed up with a law enforcement system that doesn't work.

"People who have committed murders are walking around," said Susie Vielle, a Browning resident.

"Rape is a crime that is just laughed at. For example, a friend of mine was raped two years ago. They just kept pushing the court date back, and nothing was ever done to the guy."

Prosecution statistics back these complaints.

Sen. John Melcher, D-Mont., recently read into the Congressional Record the bleak scorecard for Blackfeet crime.

"There were 99 major crimes with three convictions...during a period between June 30, 1983, and August 1, 1985," Melcher said.

"And those crimes involved death or serious bodily injury or other personal crimes of violence, like kidnapping or assault, rape or robbery and so forth.

"Ninety-nine investigations leading to three convistions seemed to demonstrate the point that the investigations of these major crimes were not resulting in significant amounts of convictions."

Browning is in the unenviable position of a town predisposed to a crime wave. It has an existing high crime rate, high alcoholism and weighty jurisdictional problems. The financially strapped Blackfeet Tribe disbanded its law enforcement force in 1981 and now twelve BIA officers patrol the reservation, which is the size of Connecticut.

To file felony cases, BIA officers must travel to Great Falls, about three hours away.

Once they get there, they is very little chance the federal prosecutor will accept their case, BIA officers claim. Instead, they must turn their information over to FBI officers, who present it to the prosecutor.

"We do the work, and everybody else gets the credit," the BIA's Morsette said. "I worked in the Dakotas, and there you were involved in every aspect of the case. Here, it's not that way.

"I'm used to calling up the U.S. attorney and dealing with them, but here, everything has to go through the FBI.

"It's demeaning. We're up here humping, and the FBI gets the credit for what we do."

Capt. Michael Parker of the Blackfeet Reservation BIA police agrees. He said the attitude of the U.S. attorney is "give me the short and quick version, and I'll make my decision on that."

Carl Rostad, the assistant U.S. attorney in Great Falls, defends this practice.

"To be honest, a case managed by the FBI tends to be a bit more thorough," he said.

Perhaps nowhere in Montana, and some contend in the nation, is the jursdictional problem more glaring than at the Babb Bar, 22 miles northwest of Browning on the Blackfeet Reservation.

The bar is 10 miles from Canada and near a major entrance to Glacier National Park, and many tourists stop in for a cold one.

And because Sunday liquor sales are illegal in nearby Alberta, literally hundreds of members of an Indian tribe known as the Bloods come across the border to drink.

On any given Sunday, the crowd at the Babb Bar is a mix of Blackfeet Indians from Canada and non-Indian tourists.

"People tend to get a little bit Old Western sometimes," bar owner Bob Burns said.

When patrons get rowdy, Burns cannot call just any police officer. He must call a BIA officer if the offending party is a Blackfoot.

If the rowdy is a Blood, he must call the Glacier County Sheriff's Office in Cut Bank, two hours away.

Once a Canadian Indian is arrested, deputies cannot do much with him other than take him to the border and give him an unofficial outster back to Canada, because the U.S. government will extradite foreign citizens only in major felony cases.

And if the offender is non-Indian, Burns must call the sheriff, whose jurisdiction and ability to serve warrants on the reservation is limited by law and court decisions.

"It's crazy," Burns said.

"When someone gets in a fight, I feel like I have to ask them, 'Would you give me your ID card so I can see what nationality you are so I'll know who to call to arrest you?' "

The U.S.-Canadian border at the Port of Piegan closes at 11 p.m.; most of the Canadian Indians drink until about 10:45, them made a headlong dash for the border.

"It's a dirty, drunken race," Blackfeet Judge Don Sollars said.

The frustration police feel in dealing with the Babb juriadictional mess is echoed throughout Indian country, where crime is rampant and the court systems confusing. Police say it is one reason why some rapists, thieves, robbers and sometimes murderers never pay for their crimes.

"They (federal officials) really don't have time to deal with the problems we have here on the reservation," Parker, said. "Therefore, they [illegible]al selective."

For examp[illegible]IA police said they have to[illegible]BI and federal prosecutors about a suspect who they believe is responsible for the hrutal rape and murder of 19-year-old Patty Young Running Crane on Sept. 24, 1986, in Browning.

The suspect, BIA officers claim, was never arrested in that case and is now being held in the rape and slaying of another Indian woman on another Montana reservation.

Additionally, they point to the case of Edith Old Man Chief, a 22-year-old woman who died in Browning last year under suspicious circumstances.

BIA criminal investigator Greg Gilham said Old Man Chief left a party late one night and was found dead the next morning about 150 yards away. Her pants were pulled down and there were some signs of violence, he said.

"The man she was last seen with told friends, 'I didn't meant to kill her,' " Gilham said.

But federal officials declined to pursue the case, ruling that Old Man Chief had frozen to death.

Sollars, who is president of the Montana and Wyoming Tribal Court Judges Association, complained about such cases.

"I don't know whether the U.S. attorney just wants cinch cases or what," he said.

"But their lack of action has overloaded our Tribal Court and made reservations like Blackfeet a haven for criminals, particularly non-(tribal) member criminals."

STATEMENT TO SENATE COMMITTEE ON INDIAN AFFAIRS

RE: BILL 1039, November 12, 1987

Presented by
William H. Covey,
President
All Citizens Equal
6 Third Avenue West
P. O. Box 673
Polson, Montana 59910

Good morning and thank you for the opportunity to make the following statement on Senate Bill 1039 today.

I am Bill Covey, resident of Big Arm, Montana, located within the Flathead Reservation in western Montana. My wife, Gene, and I are here today, representing All Citizens Equal, a citizens group organized to re-establish and maintain the Constitutional Rights of non-Tribal citizens who reside, own property or use private and State lands within the Flathead Reservation.

The Flathead Reservation, about one and one-quarter million acres, is home for about 3,000 Tribal members and 17,000 non-Tribal citizens. About 90 percent of the habitable land within the Reservation is private or State owned.

I am speaking today in general support of 1039 with suggestions for some changes.

To us, as citizens of this country, it is a paradox for this hearing to be held in this year of Celebration of the Bicentennial of our Constitution. That is because the Constitution arose, in part, due to taxation of the colonists, by England, without representation. Today, the same situation exists with the Indian Tribal Governments taxing non-Tribal members. It is "government without representation." It is very difficult for us to understand why our Supreme Court or our U. S. Congress allowed this situation to arise, without correcting it in accordance with the Constitution.

The following are our comments on specific part of Bill 1039:

COUNTER PRODUCTIVITY OF TAXATION:

Taxation implementation by any government entity, when there is no voter participation to provide the consent and constraint to tax, has provided an unstable economic environment and a deteriorated standard of living, including a life of turmoil and dissent for most of those involved. Historic examples exist from the days of the Roman Empire and Christ, to our own Revolutionary War with England. There is no reason to assume it won't happen again. The economic impact will be immediate and permanent, particularly in light of the following type of recent examples that investors have to consider:

A school district on the Apache Reservation in Arizona established a tax rate of $51 per $100 valuation. (The tax was ruled confiscatory by the Federal Courts, fortunately.)

On the Quinault Reservation, in the State of Washington, business owners are to be assessed a tax on each employee. Those hiring non-Indians will pay the maximum tax per employee. Hiring an Indian cuts the employee tax in half for that one employee.

On the Blackfeet Reservation in Montana, the enforcement of taxation proposed, included the statement, "Tax Records of (businesses) shall at all times, during business hours, be subject to inspection by the Tax Department, its members or agents. The Tax Department or its delegates shall cause the records and books of tax payers to be inspected or audited at such times as the Department deems necessary for the effective execution of its responsibilities."

With such capricious implementation already evidenced, would you, as a potential business person subject your business reputation, as well as your money, on a venture within a reservation? You would probably, as have countless others, invest somewhere else; particularly when you considered that taxation is only one of the many forms of jurisdiction being imposed on non-members by Tribal Governments.

Tribal Governments all have essentially the same needs, so having taxation rights on a reservation where there is no wealth to tax, i.e., no non-Tribal people and businesses, is certainly not equitable with Tribes that have such a potential tax base. The result is making the rich better off and the poorer no better off. Taxation, in other words, is not a solution for the Tribes that are not well off now. It, in fact, would probably drive economic development away quicker on poorer reservations because the tax rate would tend to be more oppressive.

Tribal Government taxation would result in double taxation, which is unacceptable in our country today. If this precedent is approved by Congress, it is logical to assume that State and local governments would continue to tax, along with Tribal Governments. Indeed, they would have to, to survive. And the double taxation would almost surely remove most, if not all, non-Tribal businesses from the reservations, as well as many large businesses.

Taxing deeded land in our case is similar to, say, Mexico establishing a tax on Texas residents living on deeded land in Texas, because Mexico once owned the land, and the Texas Government continuing its tax process.

CONFLICTS WITH LOCAL GOVERNMENTS:

Secondary only to the impacts on individuals, Tribal Government taxation would virtually destroy the ability of city and county Governments, in our area, to perform. The resultant double taxation would force the small businesses, large industry and individuals to scale down investments, move from the area, or provide less services. The general down-scaling would result in more depressed economic conditions that exist today. Who would want or would be willing to continue to live in those conditions? Congress and the Administration often laud the small business as the mainstay of Americas economic well being. Double taxation and taxation without representation will destroy that economic base, as surely as if Congress passed a law requiring small businesses to pay a higher tax rate than other businesses. The success of an economy demands healthy businesses, both small and large.

It has been suggested that Tribal Governments should be allowed to tax, provided they provide the services the local governments provide. We are totally opposed to such a suggestion. Our reason is, again -- we don't have representation in the government determining the services we need or don't need. How can it be morally correct or Constitutionally correct for a U. S. Citizen, living on fee-patent land, in the United States, to be policed by a law enforcement organization that doesn't have to follow the same laws the citizen does? Sounds more like we have backstepped into Germany in the 1930's and 40's!

RECOMMENDATION ON BILL 1039:

The idea of a two-year moratorium on taxation is clearly a positive approach to this issue and we commend Senators Melcher, Baucus and Simpson for sponsoring the bill. If the two-year moratorim condition remains, and we recommend that it does, we also recommend inclusion of a statement to the effect that the moratorium is automatically extended, pending the completion of a suitable and comprehensive review of the impacts of taxation on non-Tribal members and the economy of the reservations.

SECRETARY OF INTERIOR REVIEW:

We believe a review and approval of the proposed tax ordinance would be ineffectual and amount to a "rubber stamping" of the proposal. The Secretary of Interior necessarily depends upon his staff and the staff and management of the Bureau of Indian Affairs (BIA) for advice on such matters. The BIA is led and staffed to a great extent by Tribal members -- how can such a group provide objective, unbiased advice to the Secretary on matters that benefit fellow Tribal members? And the Secretary of Interior, himself, on several occasions, has stated that he will, when any doubt exists on a subject concerning the Tribes, make his decisions in their favor. How can an objective review of a tax ordinance be obtained in the Secretary's office.

AUTHORIZATION OF $450 MILLION TO HELP ALLEVIATE HARDSHIPS ON RESERVATIONS AND $75 MILLION TO ALLEVIATE EMERGENCY HEALTH CARE NEEDS ON RESERVATIONS:

We are in agreement with the writers of the Bill that financial assistance is probably needed in these subjects on some Reservations. However, we are equally convinced that there are some Reservations that do not need it. We don't agree that it should be allocated in conjunction with this bill, because it implies it is in "lieu of taxes". How can it be in lieu of taxes, where no taxes have ever been levied?

Our own reservation provides an example of our concern for this part of 1039. The Confederated Salish and Kootenai Tribes on the Flathead Reservation implemented a budget in 1987, that included $2.3 million for land purchases; $400,000 for legal services and $5,000 for health care! The average annual budget for land purchases by these Tribes is $500,000. It must be kept in mind they already own about 600,000 acres and have an on-site population of but 3,000 people. Their lands contain good farming and grazing land, highly desirable lake frontage and developed land adjacent to highways and in towns. Our question is: Why should the taxpayers be paying even more money to those Tribes who are not using their present financial resources in a manner that benefits their members?

We recommend that, if this item is included in the bill, that any Tribe who receives money must agree to an audit of its entire budget by the General Accounting Office (GAO). The GAO reports should be made public.

PRESIDENTIAL COMMISSION:

If a Presidential Commission is appointed, it must have a majority of non-Tribal members. It is an axiom of the business world that it is difficult, if not impossible, to objectively inspect yourself, therefore, selection of commission members must be very carefully done. Hopefully, if such a Commission comes about, Constitutional rights will be paramount and political ambitions and positions will be of secondary importance.

Finally, gentlemen, though we especially appreciate the effort of Senator Melcher, et al, regarding 1039, we believe it is only a bandaid to the problem. Tribal Taxation can be manifested in many ways. One of our local Tribal Councilmen recently said, "We don't care if Melcher's bill does pass, we can still levy fees, permits, and licenses -- they aren't taxes." And he was correct!

I don't believe Congress is prepared to deal with, nor does it wish to have, a continual procession of citizens seeking redress through legislation because of exorbitant fees, unusual and unfair permits and capricious licensing. And, I know non-Tribal citizens cannot afford to take each of those through the court system, so we will have to seek your help.

There is a solution to the dilemma. Congress, and only Congress, can correct the problem and can do so, fairly easily. This bill, 1039 could be amended to include the following two statements: "Tribal Government jurisdiction and taxation, of all and any type, is limited to Tribal members, Tribal members activities, Tribal owned lands and Tribal Trust lands, and activities on such lands. Fee patent lands of all non-Tribal members are excluded from all types of Tribal jurisdiction and taxation. The inclusion of those statements would accomplish the following important objectives:

1. A healthy climate for economic development and growth would be immediately established on the private lands intermingled with Tribal lands on reservations across the country. Such growth and development would provide employment for Tribal members and would foster similar development on Tribal Lands.

2. Congressional action would not be in conflict with Tribal Treaties or Indian Rights. Further, Congressional action would be a fair and equitable application of Government.

3. The Constitutional rights of non-Tribal members who own, work or otherwise use fee-patent lands on reservations would be re-established. Congress would be fulfilling it's responsibilities to it's citizens, both Indian and non-Indian.

4. The whole subject of taxes, fees, permits and licenses, as they pertain to fee patent land would be resolved in an equitable way.

PREPARED STATEMENT OF RAY K. EDER, FORT PECK EXECUTIVE BOARD

Mr. Chairman and members of the Committee, I am Ray K. Eder of Poplar, Montana, a member of the Fort Peck Tribal Executive Board.

The Assiniboine and Sioux Tribes of the Fort Peck Reservation strongly oppose S. 1039. The bill throttles the powers of Indian tribes to operate as governments, although our inherent sovereign right to impose taxes has been solidly established by Supreme Court decisions. 1/

S. 1039 would overrule these Supreme Court holdings.

First, contrary to the Supreme Court's Kerr-McGee decision, it would require paternalistic review of all tribal taxes of non-Indians by the Secretary of the Interior, choking principles of Indian self-determination and governmental

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1/ In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Supreme Court of the United States ruled that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." The Court affirmed "the tribe's general authority, as sovereign, . . . to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within [its] jurisdiction."

Two years ago, in Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985), a unanimous Supreme Court sustained the governmental power of a tribe to tax non-Indian companies without review and approval of the Secretary of the Interior.

autonomy. Second, although the Court confirmed tribal taxing authority in Merrion v. Jicarilla Apache Tribe, the bill would paralyze tribal government by placing a two year prohibition of the Secretary's approval of any tribal tax on non-Indians while a Government study is conducted and reviewed by Congress.

The supporters of the bill pretend that its enactment furthers the United States trust responsibility. If this bill in fact furthered the trust responsibility, tribes would not be uniformly resisting it. Modern Indian tribes are not foolish or stupid. They do not "need more information" before they exercise important governmental powers. Tribes know economic conditions on their Reservations. They are not going to enact taxes that discourage economic activity.

S. 1039 seeks to reimpose paternalistic federal control on tribes, reversing the positive trend of several decades of legislation freeing tribes from restrictive bureaucratic authority. Far from expressing the federal trust responsibility to benefit Indians, the bill's real intent is to protect from tribal taxation a handful of non-Indian companies which have for years reaped profits from the use of Indian lands without contributing one cent in tax dollars to the tribal governments which must provide services to reservation people.

Mr. Chairman, I would like to describe the circumstances that led to enactment of taxes at our Reservation because they illustrate the correctness of these statements. Five years ago, after the courts clearly confirmed tribal taxing power, the Assiniboine and Sioux Tribes of the Fort Peck Reservation enacted a two percent severance tax on the value of oil and gas produced on trust lands within the Fort Peck Reservation.

This past year, we faced a very substantial shortfall or deficit in our tribal budget -- in the neighborhood of $3 million for the 1987 fiscal year. This was caused by the decline in federal grants and tribal mineral leasing revenues in recent years -- problems that will continue in the years ahead.

The Tribes met this problem by reducing our budget by approximately $2 million. To do this, the Tribes instituted a hiring and salary freeze, and issued an expenditure moratorium. The Tribes also substantially reduced expenditures for law enforcement, foster care, nutritional and other care for the elderly, and education. We have dropped entire programs from our budget -- including tribal land purchases and per capita payments to tribal members (from oil and gas revenues).

At the same time, the Tribes decided to consider increasing the severance tax rate to seven percent, [2] and to consider a three percent tax on the value of all utility property on trust lands within the Reservation. The Tribes conducted a careful study of the economic impact of each proposal, both in terms of revenues received and whether the total level of taxation would diminish economic activity on the Reservation. Then, our Tribal Executive Board scheduled and gave notice of a public hearing on each proposal, inviting public comment and testimony. Copies of the draft tax ordinances were made available to the public.

Although no companies chose to testify on the severance tax increase, the Board heard testimony from seven witnesses at the utility tax hearing -- five potential taxpayers, a County Commissioner of one of the counties where our Reservation is located; and a tribal member. All testimony was recorded, and most witnesses submitted written comments as well. A number of small non-profit rural cooperative associations providing electrical and telephone services on the Reservation testified that the utility property tax rate was unreasonably high as to them, was in fact considerably higher than the taxes imposed by the State, and would substantially injure their businesses by increasing the cost of their services.

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[2] But with a limit so that the total amount of royalties and taxes could not exceed 27 percent.

When the Tribal Executive Board enacted the utility property tax ordinance, it decided to make two basic changes in the draft ordinance after considering testimony presented at the hearing. First, the Board reduced the tax rate for nonprofit cooperative rural electrical and cooperative rural telephone associations from three percent to one percent. Second, it exempted from taxation any company owning utility property on trust lands on the Reservation with a total value of less than $200,000.

These two taxes are only imposed on activities on trust lands. No deeded lands are taxed. Careful study and public hearings preceded enactment of the taxes. The tax rates are equivalent to those imposed by the State of Montana, and, indeed, the utility tax values property as assessed by the State.

The Tribes have done everything in a fair manner. An independent tribal Tax Commission is created to hear all administrative appeals on these taxes. Its three members serve for fixed terms, receive compensation at a rate that may not be altered during their terms of office, may be removed only under the procedures and standards provided in the Tribes' Code of Justice for removal of tribal judges, and must disqualify themselves in any proceeding in which their impartiality might reasonably be questioned.

Whenever an appeal is made, the Commission is required to schedule a hearing, giving the applicant notice. At this hearing, the taxpayer has the right to present oral and written testimony of witnesses under oath and to be represented by counsel. The Commission may take evidence under oath, and issue subpoenas to compel the attendance of witnesses or for the production of books, records, documents and other evidence. Its decisions may be appealed to the Fort Peck Court of Appeals.

Mr. Chairman, we believe that the circumstances on our Reservation are typical of other reservations in Montana and across the country. In the usual situation, tribes only tax activities on trust lands. Normally, taxes are paid by businesses, not individuals. The taxes are not discriminatory in that all businesses of whatever type involved pay the tax. The taxes are set at rates that are comparable to those set by other governments. This shows that Indian tribes are not driving businesses off reservations anymore than are other governments. They are merely insisting that all businesses pay their fair share of taxes "to defray the cost of providing governmental services" by tribes.

It is clear that Indian tribal governments today are providing far more services than was the case 10 or 20 years ago. This is both because tribes are operating as governments and because, given the large cutback in federal services to reservations in the present decade, Indian tribes have moved increasingly into filling this void. The Assiniboine and Sioux Tribes support health and sanitation, law enforcement, fire protection, education, transportation and other government programs on the Reservation. For example, the Tribes operate a renal care program. The rate of diabetes -- and thus the demand for dialysis -- has risen sharply in recent years. If the Tribes were not able to provide this renal care, the dialysis patients would have to be transported such great distances that treatment would not be feasible in some cases. The Tribes also provide alcoholic treatment, nutritional and other care for the elderly, and disaster assistance programs. In the education area, the Tribes fund and operate a community college and NAES College, a four year satellite campus offering a B.A. degree. We operate a foster home for children in need, and support a halfway house and a primary residential treatment center. We have for years been operating these programs with our own tribal monies, supplementing available federal funds.

Without the taxes we have enacted, the Assiniboine and Sioux Tribes could not provide many of these vital governmental services. Even with the taxes, we are able to operate only a barebones budget, below that of previous years.

It is said by some that tribal taxation is "double taxation", on top of taxes paid to state and county authorities. This point was made by some witnesses at the hearings before our Tribal Executive Board on our tribal tax program. This contention has already been addressed and answered by the Supreme Court of the United States. In in its decision in the Merrion case, the Court stated that "the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax." The Court made it clear that "when the activity taxed by the tribe occurs entirely on tribal lands, multiple taxation issue would arise only if a State attempted to levy a tax on the same activity which is more than the State's contact with the activity would justify." In other words, if double taxation is involved, the Supreme Court has already concluded that it is the state tax which should yield to the tribal tax.

If legislation is necessary, it is state taxes that should be restricted. For years, states have been taxing activities on trust lands. They have no business doing this. States provide limited services on trust land. Recent court decisions have questioned the authority of states to tax non-Indian businesses entering Reservations to do business with Indians.

Some supporters of the bill say tribes are engaged in "taxation without representation." But the Supreme Court has repeatedly held that the fact that non-Indians who choose to be on a Reservation "could not become members of the tribe, and therefore could not participate in tribal government, does not alter our conclusion" that the tribes have authority over their activities.[3] Tribes are no different from any government. In Washington, D.C. I cannot eat, sleep or drink without taxes. We have no say over taxes, levies or tolls when we choose to visit or do business here. We become subject to all laws, rules, taxes or any other act of the presiding jurisdiction, foreign or otherwise. If tribal members do not like this, we must either leave Washington, D.C. or live with it.

Before closing this testimony, we also wish to comment on the portion of S. 1039 which would authorize $525 million in federal funds for various Indian programs. This promise of money is an illusion, for as we understand S. 1039, it authorizes but does not appropriate the funds promised. In the Snyder Act and other legislation, Congress has already authorized unlimited funding for Indian programs. No additional authorizing legislation is necessary.

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[3] United States v. Mazurie, 419 U.S. 544, 557-558 (1974); Williams v. Lee, 358 U.S. 217 (1959).

Appropriations would be needed to make the promised funds a reality, and we have no guarantee that the appropriations committees, Congress or the Administration would allow such expenditures with a large deficit facing Congress and the country.

Absent appropriation of funds, there is absolutely no benefit to Indian tribes from S. 1039 that could even begin to offset its enormous harms of foisting paternalistic control over tribes and frustrating tribal self-determination and governmental authority. Since there is no benefit to Indians from this legislation, it should not be enacted. Indeed, we question its constitutional validity. A number of recent cases have held that "legislative judgments will not be disturbed" as long as the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." [4/] But this bill cannot meet this test -- it is not tied rationally to Congress' vital trust responsibility.

Mr. Chairman, thank you for the opportunity to appear before the Committee and present this testimony. We would be happy to answer any questions the Committee may have.

[4/] E.g., Morton v. Mancari, 417 U.S. 535, 555 (1974).

TESTIMONY OF THE
SHOSHONE INDIAN TRIBE
BEFORE THE
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
REGARDING S.1039 - A BILL TO REVIEW AND
DETERMINE THE IMPACT
OF TRIBAL TAXATION
ON INDIAN RESERVATIONS AND RESIDENTS

My name is Wesley Martel, and I am a member of the Wind River Tax Commission and the Shoshone Business Council, the legislative body of the Shoshone Indian Tribe of the Wind River Reservation. With me are Orville St. Clair, also a member of both the Wind River Tax Commission and the Shoshone Business Council; and Susan Williams, legal counsel to the Shoshone Tribe. Mr. Chairman, we are here in opposition to the enactment of S.1039 as we believe that the bill would change existing law regarding the power of tribes to tax non-Indians in Indian Country and would impose tension in what now is a very positive relationship between the Shoshone Tribe and the non-Indian taxpayers on the Wind River Reservation. Importantly, all of this would occur at a time in which a severe state and local government service shortfall exists for the non-Indian taxpayers on the Wind River Reservation, which gap the Shoshone and Arapahoe tribal governments are endeavoring to fill. To offer the needed increased tribal governmental services, however, the ability of the Shoshone Tribe, like every other sovereign, to enact sound tax programs applicable to all Reservation residents is critical. The proposed bill would destroy that ability. In addition, imposing Bureau of Indian Affairs ("BIA") review and approval of tribal governments' taxes not only compromises almost 200 years of tribal sovereignty, but also allows participation in tribal tax efforts by an entity without special expertise in taxation; and which should not be substituted for tribal governments as the legislating entity for tax matters on Indian reservations. Finally, the proposed bill realistically does not provide any funding alternatives in light of the current Gramm-Rudman climate, thereby interrupting the flow of services both to Indian and non-Indian Reservation residents. We would like now to address our objections in more detail.

The United States Supreme Court has made clear that tribes have the power to tax both Indians and non-Indians within tribal territory. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The Supreme Court also has held that federal law does not require the Secretary of the Interior to review and approve tribal taxation ordinances. Kerr-McGee Corp v. Navajo Tribe of Indians, 471 U.S. 195 (1985). State powers of taxation in tribal territory, in contrast, are limited. The Supreme Court has held that states may not tax Indians in Indian Country, McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), and may tax non-Indians only in those rare instances where very strong state interests are at stake or substantial state services are delivered to the non-Indian taxpayers. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980). S.1039 radically would alter this balance by placing a moratorium on new tribal taxes applicable to non-Indians and requiring submission of all tribal taxes to the BIA for review and approval. S.1039 also would run directly against established federal Indian policy favoring the strengthening of tribal governments and would have the effect of displacing important services not only to Indians but also to non-Indians.

Mr. Chairman, non-Indian taxpayers enjoy productive relationships with the Shoshone and Arapahoe Indian Tribes of the Wind River Reservation. As an example, recently the City of Riverton, populated predominantly by non-Indians and located entirely within the Reservation, sought to annex adjacent areas also populated predominantly by non-Indians. These non-Indians unanimously opposed the annexation, preferring instead to continue their exclusive relationship with the Wind River Tribes. The Wind River Tribes, consistent with the trust placed in them by these non-Indian taxpayers, provide essential governmental services both to Indian and non-Indian taxpayers on their Reservation. Such services include regulation of the public health and welfare, administration of a tribal court system, and road building and servicing.

The efforts by the Wind River Tribes to offer improved and expanded governmental services to Reservation residents, however, are hampered by burdensome state taxation which inhibits the ability of the Tribes to tax and does not ensure the services critically needed by the non-Indian taxpayers. The law is quite clear that the State of Wyoming and its political subdivisions may not tax Indians on the Wind River Reservation; the only possible state tax base, therefore, is that associated with non-Indian activity, in particular lessees' production of oil and gas from Indian-owned lands. In return for an estimated $50 million in collections of state severance taxes from the Reservation from 1974 to 1983, however, Wyoming has offered virtually no services. Similarly, Wyoming state political subdivisions appear to be providing few, if any, services to non-Indian taxpayers in return for approximately $31 million of ad valorem taxes collected from such taxpayers. Even assuming the primary services being delivered include roads and education, the Indians served on the Wind River Reservation generate substantial federal funding under the Impact Aid laws, which funding supplants the need for state contributions for education. Moreover, no evidence exists that state education contributions even benefit the non-Indian oil and gas operators who pay the taxes.

In these circumstances, the Wind River Tribes are primarily responsible to provide the important governmental services needed on the Wind River Reservation by both Indian and non-Indian taxpayers.

To enable them to do so, in 1979, the Joint Business Council of the Wind River Tribes enacted a tax on the value of oil and gas production at Wind River at a rate of 1/2 of 1%. At that time, the combined state and local tax rates were approximately 12 1/4%. Subsequently, the Joint Business Council raised its tax rate to 4% to enable the Tribes to offer increased tribal governmental services to Reservation residents. Today the Tribes are providing many services both to Indian and non-Indian residents.

Importantly, in enacting our tax and its accompanying regulations, the Joint Business Council accorded Reservation residents many opportunities to participate in shaping the law and regulations. The Tribes, through the Wind River Tax Commission, proposed regulations for the tax, which regulations provide detailed administrative procedures for payment and challenges of the tax assessments. The proposed regulations were subject to an extended written comment period and a public hearing. The Tribes will be submitting for the record of this hearing the final regulations which the Wind River Tax Commission soon will adopt. Those regulations set forth in a preamble the taxpayer comments that were received (primarily from non-Indian taxpayers) and the Tax Commission's responses.

Many comments resulted in modifications to the regulations. The process followed by the Tribes in adopting tax regulations is just one example of the prevailing practice in Indian Country of strict adherence to the due process and equal protection rights of all Reservation residents.

The single most difficult problem the Wind River Tribes face in their taxation efforts is the layering of state and local taxation upon tribal taxes on the non-Indian taxpayers. And, as noted earlier, experience shows the state and local governments profit enormously from their taxes because they offer virtually no services in return. These extra burdens, moreover, result in higher total taxes being imposed on Reservation residents than on non-Reservation residents. As a direct result, business activity on the Wind River Reservation is dampened, thereby reducing tribal income, employment for all residents, and the tax base available to provide the revenues for essential governmental services for all Reservation residents.

To protect their own ability to impose reasonable taxes for valuable tribal governmental services and to ensure that non-Indian taxpayers are not unfairly burdened merely because of their presence on the Reservation, the Wind River Tribes are contemplating several solutions. A solution will be selected only after careful study of the state and local taxes, the state and local services delivered, and the applicable laws.

We urge Congress to let this process run its course. We fear that premature legislation simply cannot address the unique circumstances at Wind River in a fair and equitable manner. Moreover, we believe it important that local governments seek to work out appropriate inter-governmental relationships, which relationships may never develop if Congress steps in at this time. We thank the Congress, however, for its interest in the concerns of our non-Indian taxpayers and urge Congress to give its sanction to the efforts of the Tribes to impose reasonable taxes for services delivered to on-Reservation residents, and to address the problem of burdensome state and local taxation of the non-Indian Reservation residents.

MR. INEZ BACA
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MR. MOSES CHAVEZ
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TESTIMONY OF MR. EDWARD PAISANO, TAX ADMINISTRATOR, SANDIA PUEBLO, NEW MEXICO REGARDING S. 1039

I appreciate the opportunity to comment on Senate Bill No. 1039. The Pueblo of Sandia is by no means unique in its exercise of taxing powers; it is, perhaps, typical in many respects. Our Pueblo, faced with ever-diminishing Federal assistance, was obliged to take some actions to permit it to carry out its normal governmental functions. The Pueblo is now in its second year of taxation, and I have been named by the Tribal Council as the Tax Administrator. Taxes imposed are possessory interest taxes (akin to a property tax), a severance tax, and a gross receipts tax. In creating these taxes, the Tribal Council bore a number of things in mind. First, the taxes should not be too burdensome on the taxpayers, partly because the Council did not desire to create an unhealthy climate for tenants and others who would choose to do business on the reservation. Secondly, the tax should be evenly applied so that similarly situated taxpayers would be treated in a similar fashion. Next, the taxing system should not only be legally fair but also give the impression to taxpayers that each was being treated fairly and given every opportunity to discuss, argue, and appeal decisions affecting the valuation, computation of affected assets, and similar questions. Our Pueblo has been successful in achieving all of these elements and, moreover, has generated some much-needed revenues. These revenues have gone to provide the Pueblo with basic government services, some of which benefit directly the taxpayers. Because of the increasing impact of the nearby population and the increasing uses of our lands, the need for a revitalized and improved tribal police department has become apparent. Tax funds will now make this possible. Numerous other examples of increased services and improved facilities could be given.

Our Pueblo has moved thoughtfully and cautiously. None of our taxes fall into categories which have not been specifically approved by the Supreme Court of the United States. Judged from virtually any point of view, the program would have to be considered successful.

Specifically with respect to S. 1039, our experience has been contrary to the facts cited in the FINDINGS. Contrary to that cited in Section 2(c), we have found that non-tribal persons generally have not protested taxes and, in fact, understand that taxation is a legitimate function of tribal government. With respect to Section 2(d), there has not been a lessening in the number of persons desiring to lease land or conduct business on our reservation as the result of tribal taxes. The provision for a moratorium on taxes by tribes seems to have an unwarranted, punitive effect. Even though the United States Constitution and the Supreme Court have stated unequivocally that tribes have the right to tax, Congress would take upon itself the power to interfere with that right. A moratorium might also have the perverse effect of tribes rushing to enact all manner of taxes, perhaps improvidently, in order to beat a moratorium deadline. The provision in the bill which would give the Secretary of Interior increased powers over Indian tribes is a distinct step backwards. This requirement conjures up the vision of reams of regulations, actions by officious bureaucrats, and a return to paternalism, which tribes have been struggling with for generations. As a matter of information, we furnished copies of materials to the BIA agency and, indeed, had some assistance from certain BIA personnel. By no means, however, did any BIA person assume a supervisory role over either the drafting of the ordinances or putting the taxing system in place. The provision that the President would appoint a commission to review tribal taxes is remarkable. Do tribes really need another study by the Federal government? The success of our own taxing program in large measure, we believe, is due to the absence of Federal panels, studies, and commissions. Taxation is a basic governmental right possessed by tribes. It is ironic that the urge to make Indian tribes more "self-sufficient" would be voiced by the same government which would seek to impair a tribe's taxing powers. To remove this power from a tribe and to hand it over to the Federal government is certainly contrary to the concept of self-determination urged by the Federal government for a number of years.

The bill calls for additional BIA funding to "alleviate economic hardship" on Indian reservations and to assist with "emergency educational and employment needs." The chances of this being funded on a reliable, annual basis, given the urgency felt by Congress to "balance the budget," are slim, indeed. We can, however, begin to do those things, relieve economic hardship and assist in the areas of education and employment, with the money generated by our taxes, and the tribe would not continue to be dependent on BIA grants and contracts.

In conclusion, let me quote from a message Mr. Ross Swimmer, Assistant Secretary of Interior for Indian Affairs, recently gave a group of Indian leaders. He noted that tribal taxation is a solution to a decreasing Federal budget. He noted further, "tribal governments have to have revenue. We at the Federal level have consistently talked about self-sufficiency, self-determination, and the need for tribes to develop businesses and to develop wealth on the reservations that can be converted into necessary things for individuals living on that reservation. It would be difficult for us to tell tribes it's fine to be self-supporting but stop short of levying any taxes because most governments tax revenue to support themselves."

Congress should tread most lightly in dealing with the powers of tribes to impose and collect taxes and, for that matter, in the decisions of tribes to utilize that revenue. Indian people look to this Committee in particular to safeguard tribal interests and prerogatives. Sandia is hopeful and confident you will carry out your obligations to the Indian people with respect to this Bill.

TESTIMONY OF THE EAST SLOPE TAXPAYERS ASSOCIATION BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

November 12, 1987

Mr. Chairman and members of the committee my name is Ross W. Cannon. I am an attorney in practice in Helena, Montana. I serve as counsel to the East Slope Taxpayers Association whose members live in the counties which are on or adjacent to the Blackfeet Indian Reservation. The association is composed of both members and nonmembers of the Blackfeet Indian Tribe. The Association's principal function is to serve as a spokesman for its members on tax issues both on and off of the Blackfeet Indian Reservation.

The association appears before this Committee in support of S. 1039 by Senators Melcher, Baucus and Simpson. The bill addresses many of the concerns the Association has heretofore expressed with respect to Blackfeet Tribal Tax Ordinance No. 80 providing for a "Possessory Interest Tax."

This Ordinance which was adopted on March 3, 1987, imposes a tax of 4% of the market value of a "possessory interest" which is defined as "any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation, including the value of any property or improvements thereon." In its present form the Ordinance exempts from the tax (1) utility facilities used exclusively to serve the reservation; (2) publicly-owned property; (3) property used as a homesite, farm or ranch; or (4) property used as a commercial business. These exclusions do not alleviate the concerns of our members about this Ordinance as will hereafter be discussed.

While our Association does not question the power of an Indian Tribe to impose taxes on those who reside within the exterior boundaries of the Blackfeet Indian Reservation we are concerned about the lack of constraints surrounding the exercise of that power. Unlike any other governmental entity the Blackfeet Tribe has the power to impose taxes on nonmembers living and working on the Reservation who by virtue of their status as nonmembers cannot vote in Tribal elections. As nonmembers they can do no more than express their concerns to the Tribe's governing body. Thus the fundamental and universal precept that there should be no taxation without representation does not exist in the case of Tribal taxation of nonmembers living and working within the exterior boundaries of the Blackfeet Indian Reservation.

Another fundamental tenant of taxation is that the level of taxation is limited to the actual cost of the services a governmental unit provides to its taxpayers. To assure this state and local taxing power is surrounded by a complex web of statutory controls designed to limit the authority of a local governing body in the exercise of that power. Among other things the statutory scheme requires the governing body to prepare and publish a budget showing the exact amount of revenue to be raised through taxation and exactly how these revenues are to be spent. In addition once the data is assembled in the form of a preliminary budget it must be made available to public scrutiny after which the governing body must conduct a public hearing on it. And so those who are to pay the taxes have an opportunity to be heard on all aspects of the preliminary budget. And because these taxpayers can vote for the members of the governing body before whom the hearing is conducted, their views of the affected taxpayers will, hopefully, be listened to with appropriate deference.

And finally, of course, the statutory scheme affords affected taxpayers access to relief before independent administrative and judicial tribunals.

None of these statutory protections exist in the case of Blackfeet Tribal Ordinance 80. The Blackfeet Tribe, at least, does not make any financial data available to taxpayer scrutiny. It does not publish a budget. Taxpayers have no access to any data from which they can determine the sources of tribal revenues or how these revenues are in fact to be spent. It is not possible, therefore, for a taxpayer to determine whether the taxes to be collected bear a fair relation - or any relation - to the cost of the services the tribal government provides to those to be taxed.

It needs to be remembered that all of those to be taxed under Ordinance 80 also pay taxes to the county and school district in which they live. Many also pay taxes to a city or town. It is the cities, towns, counties and school districts which, of course, provide the basic services such as schools, police and fire protection, road and street maintenence and so on. So the question is whether the level of taxation called for in Ordinance No. 80 is fairly apportioned to the services the Blackfeet Tribe provides to these taxpayers over and above those services they receive from the appropriate county, city, town or school district. What additional services, if any, do these taxpayers receive from the Blackfeet Tribe in return for the taxes they will required to pay under Ordinance 80?

We recognize that the Tribe contends that it does provide services to those it proposes to tax under Ordinance 80 but this is a contention without supporting data. And this is why we strongly advocate and support S. 1039. Among other things it declares a two-year moratorium on the implementation of tribal tax codes. We recommend that during the moratorium Congress should direct the General Accounting Office or other appropriate agency of the Federal Government to do an independent evaluation of what governmental services Indian Tribes do in fact provide to members and nonmembers living on the Reservation and whether the tax sought to be imposed is fairly related to the cost of these services.

COMPARATIVE TAX RATES

As Ordinance No. 80 presently reads the value of a possessory interest, including all property and assessments thereon shall be 100% of market value as shown on the books of the county to which the 4% rate is applied. This rate is substantially higher, for example, than that imposed on the same land and improvements by state law. Thus, whereas Ordinance 80 would tax land and improvements at a flat 4% of full market value state law provides for a much lower tax. First state law declares that the taxable value of land and improvements is 3.86% of full market value after which the appropriate number of mills is then applied to the taxable value of these land and improvements. Thus, for example, if a home and the land on the Reservation is worth $100,000 the taxable value is $3,860. And assuming this property is located within the Town of Browning the total mill levy for the county, school district and town or city would be 318.46 mills. The tax is thus $1,229.82 for all three taxing entities. Contrast this with the flat $4,000 which would be due under Ordinance 80. The effective rate of tax the Tribe thus applies to the full market value of that land and buildings is 4% whereas the effective rate all three units of local government - counties, school district and the Town of Browning - apply to this same property is 1.2%. The total tax bill on that land and home would be $5,229.82 76% of which would go to the Tribe. Can it be fairly said that the Tribe provides that proportion of the services the homeowner receives from the county, school district and town?

By the same token the property of cooperative rural electrical and cooperative rural telephone associations which is not exempt from Ordinance 80 in its present form is similarly taxed at 4% of its full market value whereas the effective rate applied by the same three local governmental entities - county, school district and town - is .95% of full market value. Thus approximately 75% of the cooperative's combined total taxes go to the Blackfeet Tribe. One wonders whether Glacier Electric Cooperative Association which serves the Blackfeet Reservation receives this proportion of its services from Tribal Government.

SECRETARIAL APPROVAL

It is no great consolation that homeowners and farmers and ranchers are presently exempted from the Tribal tax since according to Ordinance 80 any exemption can be deleted from the Ordinance by resolution of the Blackfeet Tribal Business Council. Nothing in the Ordinance or in Federal Law appears to require Secretarial "approval" or "review" of an action of the Blackfeet Tribal Business Council in either deleting an existing exemption or changing the rate of the tax. In fact the Ordinance itself provides for amendment by a majority vote of the Blackfeet Tribal Business Council.

The Blackfeet Tribal Constitution requires Secretarial "approval" of a tax on nonmembers: It provides as follows:

ARTICLE VI - POWERS OF THE COUNCIL

> Section 1. Enumerated powers. The council of the Blackfeet Reservation shall exercise the following powers . . . .
>
> * * * * *
>
> (h) To regulate and license all business or professional activities conducted upon the reservation, subject to the approval of the Secretary of the Interior and to levy assessments for public purposes, provided that any assessments upon non-members trading or residing within the jurisdiction of the tribe shall be subject to the approval of the Secretary of the Interior (Emphasis supplied).

Since the Ordinance itself has already met Secretarial "approval" one wonders whether any amendments to it would require additional Secretarial "approval." We do not know, for example whether the amendments the Council adopted to this Ordinance on March 3, 1987, went through a Secretarial "approval" process.

Thus the provisions of sections 3 and 4 of S 1039 requiring Secretarial "review" of all tax ordinances proposed by an Indian tribe which would be imposed upon nontribal persons on an Indian reservation and making this "review" a trust responsibility coupled with the provisions of section 5 prohibiting implementation of a proposed Tribal tax code which would be imposed on nontribal persons unless approved by the Secretary of the Interior are vitally important. They make it clear both that the proposed Ordinance itself must be subjected to Secretarial "review" and if it is to be implemented as to nontribal persons it must then also be subjected to Secretarial "approval."

RECOMMENDATIONS

For the reasons set forth above S. 1039 our association recommends that S 1039 be amended as follows:

1. To require the Secretary of the Interior to adopt regulations providing the kinds of protections found in state law relating to state and local taxation and specifically the same kind of budgeting requirements that are imposed on counties, cities and towns including public scrutiny of a preliminary budget, a public hearing thereon and redress to the Secretary of the Interior or to an independent panel.

2. To allow a nonmember taxpayer to protest a tax to the Secretary or to an independent panel. This is the only means a nonmember would have to obtain an independent and impartial review of any aspect of the assessment and collection of taxes from an individual taxpayer. While Ordinance 80 and 80A provide for a tax protest or appeal procedure the entity created for that purpose - a "Tax Protest Panel" - lacks independent status as does the Blackfeet Tribal Court and the Blackfeet Court of Appeals - to which tax protest appeals then go. Thus we propose that a nonmember be allowed to protest or appeal a tax to the Secretary of the Interior or to an independent panel comparable to the Interior Board of Indian Appeals which would have the powers comparable to local and state tax appeal boards.

CONCLUSION

S. 1039 is a step in the right direction. It addresses many of the concerns of nonmembers living on the Blackfeet Indian Reservation. We believe the amendments we propose are essential if nonmembers who otherwise lack voting power within the reservation are to allowed to participate in the formulation of the tribal budget and if they are to be insured of procedural and substantive due process in taking appeals from taxes imposed upon them by the tribe. We, therefore, urge the adoption of S 1039. Thank you Mr. Chairman for affording us this opportunity to testify before your Committee.

PREPARED STATEMENT OF EARL OLD PERSON, CHAIRMAN, BLACKFEET TRIBE

Mr. Chairman, thank you for the opportunity to appear before this Committee and voice my opinion on Senate Bill 1039, which has been introduced by Senator Melcher and Senator Baucus from my home state of Montana, along with Senator Simpson from Wyoming.

Mr. Chairman, the Blackfeet Tribal Business Council has carefully reviewed, considered and discussed Senate Bill 1039. The Tribal Council subsequently passed Tribal Resolution No. 40-88, which opposes Senate Bill 1039 and instead urges that the focus of any review for the adverse impact of taxation on Indian Reservations be shifted to an examination of the levels of federal and state taxation, levels which far exceed the level of tribal taxation.

The power to levy and collect taxes is an inherent aspect of the retained sovereignty of Indian Tribes. This is a power which, until relatively recently, was not exercised for a number of reasons. Many of the Tribes had sufficient alternative sources of income to continue to meet the demand for the delivery of goods and services which are constantly placed on tribal government. On my own

Reservation, oil prices were high, which meant more revenues for my Tribe. Cattle prices were good, which meant that our ranchers would make a living on their own terms without having to rely on the Tribe. The timber industry was active and the Tribe as a result was realizing revenues from this industry. The Tribe was able to lease its land to Indian and non-Indian farmers and ranchers and realize even more revenues. In summary, the level of tribal revenues was sufficient to satisfy the demands which were placed on the Tribal Council and which the Tribal Council expected to satisfy.

Meanwhile, the Federal Government and State Government all along have taxed individuals and commercial activities on the Reservation, to the exclusion of tribal taxation. The typical attitude of the State of Montana has been that the State will continue to tax whatever they want. The result has been litigation, and the Tribe has been successful in every lawsuit concerning the State's authority to tax the Tribe and tribal members.

Today, we are faced with a situation where our tribal revenues are not sufficient to satisfy the demands of the residents of the Blackfeet Indian Reservation. In 1982, for example, total tribal revenues were $7,911,436. In 1984, tribal revenues decreased to $4,693,918. For fiscal year 1988, tribal revenues are projected at $4,085,188.

The Blackfeet Tribe is continuing to supply Congress and Reservation non-Indians proof of services (although we are proud that we can prove that we provide such a wide range of services). I have attached documents to demonstrate this proof of services. I might point out that the State does not have to supply this information when they impose a tax on the reservation.

The Tribe is pursuing an economic model which will benefit all residents of the Blackfeet Indian Reservation. The Tribe is majority shareholder in the Blackfeet Indian Writing Company, which manufacturers and markets writing instruments. The Blackfeet National Bank recently began operations as a federally-chartered, tribally-owned Bank to serve the Reservation and enhance the local economy. The Blackfeet Tribe recently purchased 100% of the capital stock of Advertising Corporation of America, a company active in the specialty advertising industry. This Company will be relocated to the Blackfeet Reservation so that more employment opportunities can be provided. Also, the Tribe has had a principal role in the establishment of Heart Butte Industries, a tribally-owned clothing industry on the Reservation which has negotiated major contracts with Commonwealth Edison of Cincinnati, Ohio. This industry is currently employing about forty people.

The point I am making is that the Blackfeet Tribe has taken the predominant if not the sole role in advancing the lifestyle of Reservation residents. State taxation has historically served as a negative factor because the truth is that the State and Counties have not put back into the

Reservation any amount of funds near the amount of taxes which have been collected from Reservation residents and Reservation businesses. Further, the levels of Federal and State taxation are in turn disproportionate to the actual level of tribal taxation. For example, total state taxation on oil and gas production is approximately 22%-25%. This compares with the Tribe's level of taxation of 4.25%. Yet, the natural resource being taxed belongs to the Tribe and tribal members in most instances. This is an unfairness which is never addressed or proposed to be addressed, by Senate Bill 1039, or any other Act of Congress. Someone+ should tell the Blackfeet Tribe and the other Indian Tribes what is improper about limiting federal and state taxation on Indian Reservations so that the Reservation economies can truly sustain themselves. That is where true progress can be made so that a true reservation economy will be dynamic enough to be self-sustaining.

The Blackfeet Tribe and other Indian Tribes do not want a continued fostering of the creation of an artificial economy. That is what an authorization of $525,000,000 under Senate Bill 1039 does. We who live on the Reservations have said for years and years that the true answer to the proper exercise of sovereign powers is the establishment of strong Indian sovereigns who possess the capacity and professional judgments to make well-considered, fair-minded decisions. A continued strong reliance on the Federal Government is not the answer. Besides, the

$525,000,000 is merely an authorization, and not an actual appropriation. Appropriations in this era of balanced budget mandates, is simply not guaranteed by Senate Bill 1039, nor is it an attractive concept.

With respect to the argument that tribal taxation without representation is occurring, I would point out a number of things. First, the Blackfeet Tribal Business Council has adopted a policy regarding tribal ordinances in general and commercial and tax ordinances in particular. The policy mandates a public hearing with due notice to all affected parties. This is the policy and it has ben closely adhered to.

Second, the Tribe often mandates a specified period of time for public comment, frequently in the form of written comment. The Tribe had followed a pattern of publishing an entire piece of tribal legislation in the local newspaper, holding public hearings and soliciting written comments. This proved to be too costly, so the Tribe has made individual copies of the proposed legislation available to the public well in advance of the hearing date. Thus, anyone has the opportunity to review the legislation and express their views. The copies are provided at Tribal expense.

If these methods of public input are insufficient, affected parties are always welcome to appear before the Tribal Council and express their concerns and recommendations. In my years of serving on the Council, I9 have found many many non-Indians pursue this avenue. Not once have they been denied the right and opportunity to discuss matters with the Council directly. I would go so far as to say that the individual who lives on the Blackfeet Reservation has more access to the Tribal Government than any other government because of the frequency with which we meet.

I fail to understand the rationale behind arguments that the Blackfeet Tribe and other Indians are practicing taxation without representation. Tribal taxation is a legitimate exercise of a sovereign nation's authority to generate revenues. For instance, if I travel to a State where a sales tax has been enacted, I must pay this sales tax. I have no choice not to pay, nor do I have the right to vote. I have subjected myself to that sovereign's jurisdiction as long as I remain within its territory. The same principle applies when non-Tribal members come to the territory of an Indian Tribe. So the concept of sovereign taxation is not unique when the sovereign exercise of power and authority to tax occurs amongst Indian tribes.

The sad fact of the matter is that the Blackfeet Tribe and other Indian Tribes cannot afford to operate at a deficit. The Tribes must retain the inherent authority to tax in order to sustain the quantitative and qualitative standards of the delivery of goods and services to the residents of the Blackfeet Indian Reservation. Senate Bill 1039 would stop the process of tribal sovereign development and reduce Indian Tribes to what they have historically been, totally dependent on the Federal Government for minimal survival. We don't want this. We want to continue to experience the opportunities of self-development, and we want to take our rightful place in the national and international arena of sovereign-to-sovereign relations and relationships. For these reasons, the Blackfeet Tribe opposes Senate Bill 1039.

Thank you.

EARL OLD PERSON, Chairman
Blackfeet Tribal Business Council

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EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE CHAIRMAN
MARVIN WEATHERWAX, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL

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LANE KENNEDY
BERHARD ST. GODDARD
LEE WILSON
GEORGE KICKINGWOMAN
TED WILLIAMSON

RESOLUTION

No. 40-88

WHEREAS, The Blackfeet Tribal Business Council is the duly constituted governing body within the exterior boundaries of the Blackfeet Indian Reservation, and

WHEREAS, The Blackfeet Tribal Business Council has been organized to represent, develop, protect and advance the views, interests, education and resources of the Blackfeet Indian Reservation, and

WHEREAS, The Blackfeet Tribal Business Council has reviewed and considered Senate Bill 1039, a Bill which has been introduced in the Senate of the United States by Senator John Melcher, D-Montana, for himself and Senators Max Baucus and Alan Simpson, and

WHEREAS, The Blackfeet Tribal Business Council, which serves as the governing body of the Blackfeet Tribe, in the face of constantly diminishing Federal and Tribal revenues, and an increasing demand on the Blackfeet Tribal Government for the delivery of goods and services to all residents of the Blackfeet Indian Reservation, has determined that tribal taxation is essential in order to continue to provide governmental services to said residents, and

WHEREAS, Senate Bill 1039 would totally frustrate the efforts of the Blackfeet Tribe as a sovereign nation to realize goals and objectives of the development of an economic model which encompasses the broad spectrum of efficiency and effectiveness in the delivery of goods and services to the residents of the Blackfeet Indian Reservation, and

WHEREAS, Senate Bill 1039 is not reflective of the true and accurate situation on the Blackfeet Indian Reservation, which is that the Blackfeet Tribe in enacting any taxation ordinance has made special efforts to ensure individual input by providing public hearings, allowing a specified period of time for public comment, and availing individuals of the opportunity to meet and confer with the Blackfeet Tribal Business Council in order to expressly state their concerns and recommendations, and

WHEREAS, The levels of Federal and State taxation with respect to persons and activities occurring within the exterior boundaries of the Blackfeet Indian Reservation greatly exceed the level of tribal taxation, and

WHEREAS, Senate Bill 1039 is an unnecessary intrusion on and interference with the goals of the Blackfeet Tribe to exercise the full power, authority and decision-making ability which has been accorded other sovereign entities within the United States of America, and

WHEREAS: Senate Bill 1039 totally discourages the path of self-sufficiency for Indian sovereigns and would instead by the enumerated authorizations of funds for alleviation of economic hardship and emergency health care needs merely make Indian Tribes and Indian people much more dependent on the United States Government for survival, now

THEREFORE BE IT RESOLVED:

1) The Blackfeet Tribal Business Council as the governing body of the Blackfeet Tribe hereby opposes S.B. 1039 for the aforementioned reasons.

2) The Blackfeet Tribal Business Council recommends that a review be undertaken which examines the level of adverse economic impact which Federal and State taxes have on Indian Reservations.

3) The Chairman and Secretary are hereby authorized to sign this Resolution.

ATTEST:

THE BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION

MARVIN D. WEATHERWAX
Secretary

EARL OLD PERSON
Chairman

CERTIFICATION

I hereby certify that the foregoing Resolution was adopted by the Blackfeet Tribal Business Council in a duly called, noticed and convened Regular Session, assembled the 5th day of November, 1987, with Seven (7) members present to constitute a quorum, and with a vote of Seven (7) members FOR and None (0) members OPPOSED.

MARVIN D. WEATHERWAX
Secretary

(SEAL)

Attachment A.

ESSENTIAL GOVERNMENTAL SERVICES PROVIDED BY THE BLACKFEET INDIAN TRIBE

LAW ENFORCEMENT SERVICES:

- Law and Order Juvenile
- Tribal Court
- Appellate Court

HEALTH AND SOCIAL SERVICES:

- Child Abuse Prevention
- Social Services Administration
- Alcoholism Services - Jack Pine Lodge - Heart Butte
  - Medicine Pine Lodge - Browning
  - Takes Two Center - Browning
- Nursing Home
- Food Stamp Issuance
- Home Health Services
- Developmental Disabled - Dusty Bull Training Center
- Child Neglect Program
- Community Health Representatives
- Burial Services
- Needy Food Issuances Program

EDUCATIONAL SERVICES:

- Blackfeet Community College
- Educational Program
- Headstart Program
- Cultural Program

COMMUNITY SERVICE PROGRAMS:

- Solid Waste Program
- Senior Citizens Programs
- Crimestoppers
- Swimming Pool
- Transit Buses
- Fire Protection
- Campground/Recreational Facilities
- Sanitation Services
- Emergency Hay Program
- Land Management/Fish & Wildlife
- Oil & Gas Monitoring

OTHER SERVICES PROVIDED DUE TO THE BLACKFEET TRIBE

STATEMENT OF FRANK RYAN, DEPUTY TO THE ASSISTANT SECRETARY - INDIAN AFFAIRS (TRUST & ECONOMIC DEVELOPMENT) BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1039 A BILL "TO REVIEW AND DETERMINE THE IMPACT OF INDIAN TRIBAL TAXATION ON INDIAN RESERVATIONS AND RESIDENTS."

November 12, 1987

Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to discuss S. 1039, a bill "To review and determine the impact of Indian tribal taxation on Indian reservations and residents.

We are strongly opposed to S. 1039 because (1) it usurps the tribes' governmental authority to tax non-Indians within their reservations, (2) it requires the Secretary of the Interior to review all tribal tax ordinances as a part of the Federal trust responsibility, (3) it provides for $525,000,000 in new annual appropriations authorizations, and (4) it creates an unnecessary bureaucracy to develop data that can already be assessed by existing Congressional Committees and Executive branch personnel.

Apparently the bill is premised on the assumption that non-Indians are not adequately protected from unfair tribal taxation and that increased Federal funding would eliminate the need for tribal taxation.

Tribal jurisdiction over non-Indians is a controversial matter in Indian country but the courts have clearly ruled that under certain circumstances tribes have the right to tax non-Indians living within the jurisdiction of the tribal government. Although the case law upholding tribal taxing power dates to the early days of this century (Morris v. Hitchcock, 194 U.S. 384 (1904) and Maxey v. Wright, 3 Ind. T. 243, 54 S.W. 807, aff'd, 105 Fed. 1003 (1900)) tribes have only recently begun exercising their taxing authority as they pursue various forms of economic development on their reservations. In recent years tribal jurisdiction over non-Indians has been the subject of frequent litigation. The recent supreme court decisions in Merrion v. Jicarilla Apache Tribe 455 U.S. 130 (1982) and Montana v. United States, 450 U.S. 544 (1981) indicate that tribal authority over non-Indians is most clear and most extensive when non-Indian activities occur on Indian land. From a public policy perspective, we see no justification for limiting or controlling tribal authority to tax non-Indians who are using tribal property or transacting business with Indians.

S. 1039 requires the Secretary of the Interior, as part of the Federal trust responsibility, to review all tax ordinances proposed by an Indian tribe which would be imposed upon non-tribal persons on an Indian reservation. Some tribal constitutions require the tribes to have certain of their tribal ordinances approved by the Secretary while others do not. Another recent court decision Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 1985, found that no federal statute or regulation requires Secretarial approval if a tribe did not have a constitution and therefore had no tribal requirement to seek secretarial approval. A July 10, 1987 Congressional Report For Congress entitled "Taxation Within Indian Lands: The Legal Framework" provides the following quote from that case.

"The court made a statement as to the relationship between tribal taxing authority and the current federal policy toward Indian tribes:

> ...the Federal Government is 'firmly committed to the goal of promoting tribal self-government.' ... The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S.
195, 200-201 (citations omitted)."

Mr. Chairman, we recently testified before the Interior and Insular Affairs Committee in the House of Representatives that we do not believe the Secretary should be reviewing and approving tribal constitutions. As we have said many times before in this committee, the Federal government must get out of the way so that tribal governments can manage their own affairs. We are strongly opposed to the provision in this bill requiring a very heavy federal role.

S. 1039 also authorizes appropriations of $525 million per year over the next two years to "alleviate economic hardship" and "alleviate emergency health care needs" on reservations. The authorization apparently stems from the finding in Section 2 that "for six years Federal funding for Indian programs has been reduced." Insofar as we can determine, this finding is incorrect. Surveys of Federal agencies have indicated that governmentwide outlays for special Indian programs increased from FY 1981, the final year of the Carter Administration, to FY 1986, the last year for which final statistics are available, by $692 million (from $2,481 million in FY 1981 to $3,173 million in FY 1986). Such an increase clearly calls into question the need for the additional authorization in S. 1039.

In summary, we do not agree with the assumptions underlying this bill. It is in the tribes own best interest that they exercise their taxing power in a manner that is fair, equitable and promotes, or at least does not discourage, economic activity that benefits the tribes and their members. The Federal courts have consistently upheld the tribes right to tax non-Indians within the jurisdiction of their reservations. The Department of the Interior also supports and encourages tribes to use their taxing power to generate needed local revenues.

This concludes my prepared statement. I will be pleased to answer any questions the Committee may have.

STATEMENT OF SENATOR MAX BAUCUS
REGARDING S. 1039
A BILL TO REVIEW AND DETERMINE THE IMPACT OF NATIVE AMERICAN TRIBAL TAXATION ON NATIVE AMERICAN RESERVATIONS AND RESIDENTS

November 12, 1987

Select Committee on Indian Affairs

Mr. Chairman, as an original cosponsor of S.1039, I wish to thank the Chair for this opportunity to present my statement on the bill before this Committee.

I do not believe the wise members of tribal councils, such as Mr. Old Person of the Blackfeet or Mr. Real Bird of the Crow tribes in Montana, ever intended to create conflict by enacting tribal taxes. Nevertheless, the present conflict in Montana over tribal taxation is real.

Tribal taxation is a new phenomenon. In an effort to become more self-sufficient -- a position that federal government has encouraged -- and perhaps in response to cut backs in funding for all federal programs, some tribes are levying taxes on the use or occupancy of their lands.

When deeded lands and non-tribal businesses lie within reservation boundaries, problems begin to arise. A county or state government may levy a tax for the same reason as the tribe, creating the appearance of double taxation.

How do we deal with the Constitutional question of taxation with fair representation on reservations?

In an analysis of tribal status that existed before the United States became a nation, the U.S. Supreme Court found that tribes were "domestic dependent nations." Based on this determination, the U.S. Supreme Court established a precedent for tribal governments to levy certain taxes on non-Indians living on reservations.

But Tribal governments are not required to hold hearings on proposed taxes or tax increases. It remains unclear what role non-tribal members who are subject to the tax have in the process by which the tax is developed.

Congress needs to help clarify this.

When any government has the power to tax, it has the responsibility to tax fairly and justly. As any member of this Committee can testify, weighing this balance is difficult.

Decisions on tribal tax ordinances cannot be made overnight. But decisions must be made.

The legislation before you today provides a foundation for resolution. While placing a two year moratorium on tribal taxes, it calls for a Presidential commission to study the economic impact of tribal taxation on reservations. Furthermore, it authorizes funding for the Secretary of Interior for two years to alleviate economic hardship on reservations during the study period.

As I have stated in the past, Congress must have more information on what types of taxes tribes can levy and the procedures tribes should follow to ensure that taxes are proper and wise.

Congress must better understand tribal relationships with county and state governments when tax decisions are made to provide services.

The testimony presented by the witnesses here today helps. I commend the Chairman for his work on this difficult issue and for holding this hearing. I look forward to working with the members of the Indian Affairs Committee in moving this legislation forward.

Testimony
of
The Crow Tribe of Indians
before the
Senate Select Committee on Indian Affairs
Regarding S. 1039
A Bill to Review and Determine the Impact of Tribal Taxation on Indian Reservations and Residents

This testimony is submitted on behalf of the Crow Tribal Council and the Crow Tax Commission. The Tribe and Commission vigorously oppose the enactment of S. 1039, because this bill will have an extremely detrimental impact on the Tribe's ability to provide essential services to both Tribal members and non-members on the reservation. By limiting the Tribe's authority to impose taxes upon non-Indians on the reservation, S. 1039 would leave the Tribe without the financial resources to provide critically needed services. At the present time the Tribe is not imposing any taxes to pay for these services, although we are considering the enactment of tax codes. All of the services currently provided by the Tribe are financed either through federal funds or from revenues derived from Tribal natural resources. The revenue from sales of Tribal resources is not likely to be sufficient to sustain needed governmental services over the long term.

A sovereign is clearly entitled to enact sound tax programs in order to generate revenue to provide governmental services. The Tribe has a right to impose a fair and reasonable tax upon those transacting business on the reservation and utilizing reservation lands and services. The United States Supreme Court, time and time again, has held up the power of Tribes to tax both

Indians and non-Indians within tribal territory. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Tribal self-determination necessitates such a result, which result would be changed if S. 1039 were enacted. Without the power to impose reasonable taxes, the political integrity of the Tribe and the health and welfare of reservation residents will be permanently impaired. The Supreme Court has repeatedly held that Tribes have the authority to regulate the on-reservation activities of both members and non-members when the regulated activities have a direct impact on the political integrity or health and welfare of the Tribe. Montana v. United States, 101 S.Ct. 1245 (1981). The power of taxation is an essential attribute of self-determination and is necessary to ensure the political integrity of Tribal government. Kerr-McGee v. Navajo Tribe, 471 U.S. 195 (1985).

Currently, services provided by the Bureau of Indian Affairs, the states and local governments do not even begin to meet the needs of reservation residents. The Tribe has been filling this gap on the Crow Reservation. However, passage of S. 1039 likely would destroy the Tribe's ability to continue to do so. Burdensome state taxation currently impairs the Tribe's ability to tax and to offer critically needed services. Moreover, the amount of services rendered by the state on the reservation is far exceeded by the amount of tax revenues the state collects from on-reservation activities. It is our view that S. 1039 constitutes a drastic step in the wrong direction and that its enactment would have a significant negative impact not only on reservation members but also on non-Indians transacting business on the reservation.

The Tribe would like to address specifically several points of concern raised by the Committee during the November 12 hearing on S. 1039. First, emphasized at the hearing was that any Tribal tax imposed upon a utility company results in a proportionate rate increase for all the utility's customers, including non-reservation customers. This point is not disputed. However, also true is that the state's imposition of taxes on the utility company results in a rate increase on all the utility's customers, including customers living on the reservation. Moreover, the state tax rate generally is far higher than the Tribal tax rate. No one, however, has suggested that the state forego or limit taxation of utility companies because the burden of these taxes falls on reservation customers.

Another concern expressed at the hearing was that imposition of the Tribal tax upon non-Indians on the reservation constitutes "taxation without representation." This argument, however, is flawed. To begin with, prior to enactment of any taxes or rules or regulations, the Tribe's Tax Code mandates public notice and a public meeting. In addition, due process is guaranteed through an administrative appeals process. The Tribe is sensitive to the importance of involving the general public on the reservation in the process of enacting a new tax ordinance. In 1986, the Crow

Tax Commission began considering the possibility of enacting a tax and proposed to the general public on the reservation several possible taxes for this purpose. The Commission's intent was to obtain the reaction of the public to the various proposed taxes before selecting which, if any, of the taxes, would be presented to the Tribal Council. Thus, the general public is involved extensively prior to the enactment of the tax.

Moreover, whenever someone travels to a foreign jurisdiction, that individual may not vote there but is subject to all rules, regulations and ordinances of the jurisdiction. For example, one need not be a voting resident of a state to be subject to the state's sales tax; everyone who buys merchandise within the boundaries of the state must pay the tax. This is the same situation with most non-Indians on the reservation. As far back as the early 1900's, federal courts made it very clear that Indian Tribes have the governmental authority to prescribe terms upon which non-citizens may transact business within the Tribe's borders. See, e.g., Buster v. Wright, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). All non-tribal members who do business on the reservation or who chose to live there have been on notice for almost a century that they are subject to all the Tribe's ordinances, rules and regulations, without a right to vote in tribal elections. And, of course, non-residents subject to taxes imposed by the Tribe are guaranteed due process and equal protection safeguards.

The State of Montana currently is providing virtually no services on the Crow Tribe Reservation, yet it has collected an extraordinarily large amount of taxes from non-Indians engaged in mineral extraction from reservation lands. See, Crow Tribe of Indians v. State of Montana, 819 F.2d 895 (9th Cir. 1987). It is the Tribal government that is providing services to non-Indians on the reservation. However, the Tribe's ability to continue to provide services will be impaired severely should S. 1039 be enacted. Additionally, the Tribe has developed good relations with most of the non-Indian taxpayers on the reservation. This rapport will no longer flourish should S. 1039 be passed.

Finally, tax rates imposed by states generally are much higher than those imposed by Tribes, and are a much greater burden on non-Indian taxpayers conducting business on the reservation. Additionally, tribes actually collect far less tax revenues than do states from non-Indians on-reservation. The Tribal collection rate is more reasonable, especially when viewed in relation to the services non-Indians are receiving on reservations. As noted in the Ninth Circuit Crow case, between 1975 and 1982 Westmoreland Resources, a mineral lessee on the reservation, paid $53,800,000 in severance taxes and $8,100,000 in gross proceeds taxes to the State of Montana for is strip mining operation on the reservation. The Tribe, however, received no tax revenue from Westmoreland for this same period. 819 F.2d at 897. Moreover, the product was generated on the reservation by activities in which the Tribe had a strong interest. As a result of the state tax, Tribal interests were impaired. The court, accordingly, held the state taxes invalid.

To conclude, the Crow Tribe views this legislation as ill-conceived and in the best interests of neither the Tribe nor the non-Indian taxpayer on the reservation. The Tribe stands in firm opposition to S. 1039.

STATEMENT OF STANLEY G. JONES, SR., CHAIRMAN TULALIP TRIBES OF WASHINGTON ON S.1039, A BILL "TO REVIEW AND DETERMINE THE IMPACT OF INDIAN TRIBAL TAXATION ON INDIAN RESERVATIONS AND RESIDENTS"

On behalf of the Tulalip Tribes of Washington, I again would like to express our strong objection to S.1039. The bill would suspend the Secretary of the Interior's authority to approve tribal tax ordinances during a two-year study period primarily because "non-tribal persons on reservations have protested the imposition of tribal taxes". Sec. 2(c).

The bill acknowledges that, "for six years Federal funding for Indian programs has been reduced". Sec. 2(b). This decrease in federal funding is premised, in large part, on maintaining and strengthening the ability of tribal governments to generate independent revenues. For example, in President Reagan's January 24, 1983 Statement of Indian Policy, the President committed his administration to the following principles:

> This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.
>
> * * *
>
> It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their

> self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.
>
> * * *
>
> Summary
>
> This Administration intends to restore tribal governments to the rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

Ironically, the proposed bill would take away the most basic government tool for self support, the ability to tax all persons who occupy or use its territory. The bill would let the federal government, rather than tribes, decide whether tribal taxation of non-tribal members, who utilize reservation natural resources and services, should be required to contribute to the funds necessary for the operation of tribal government and the strengthening of the reservation economy.

If there is any adverse impact on non-tribal members from tribal taxation, it is not because tribes are taxing them, but because states and local governments continue to claim authority to impose their taxes within reservation boundaries as well, at least as to non-tribal members. See, e.g., Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112-1114 (9th Cir. 1981),

cert. denied, 459 US 916, 103 S. Ct. 230, 74 L.Ed.2d 182 (1983); Merrion v. Jicarilla Apache Tribe, 455 US 136, 100 S. Ct. 2578, 65 L.Ed.2d 21 (1982); Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 US 832, 102 S. Ct. 3394, 73 L.Ed.2d 1174 (1982); White Mountain Apache Tribe v. Bracker, 448 US 136, 100 S. Ct. 2578, 65 L.Ed.2d 665 (1980). See also, New Mexico v. Mescalero Apache Tribe, 426 US 324, 103 S. Ct. 2378, 76 L.Ed.2d 611 (1983). The bill, however, does not propose to place a moratorium on state, county and city taxation within Indian reservations, pending a study of their adverse impact on 1) the ability of tribes to generate badly needed revenues; and 2) the economic welfare of reservation residents and business persons.

The objective of the long-standing federal policy to promote tribal self-government and strengthen reservation economies cannot be achieved if tribes are unable to tax all those within its reservation borders, whether or not those persons are citizens of the tribe. Particularly as federal funds decrease, more and more tribes must reevaluate their tax systems, as we have done at Tulalip. The taxes the Tulalip Tribes have set and proposed are no greater than comparable taxes imposed by State or local governments, and in some cases are significantly less. Having the ability to tax non-member reservation employers not only allows tribes to provide economic incentives for businesses to locate on Indian reservations but also can provide tax credits which encourage Indian employment, thereby reducing the already over-burdened, tribal services for households with unemployed, or marginally employed, heads of the family. See, Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983), cert. denied, 467 US 1214. Tribal government cannot remain healthy in this age of diminishing federal financial support, without the most basic tool of funding government operations.

With the extreme poverty common among tribal reservation members, it is often the non-tribal member who is reaping the greatest economic benefit from reservation resources. Should not these non-members contribute to the cost of protecting and preserving those resources and services from which they benefit?

The United States Supreme Court has repeatedly re-affirmed a tribe's authority to tax non-tribal persons engaged in economic activities within its reservation, as essential to sustaining tribal government. For example, in Merrion v. Jicarilla Apache Tribe, the Court said:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See, e.g., Gibbons v. Ogden, 9 Wheat. 1, 199, 6 L. Ed. 23 (1824).

The Court also stated:

> The Tribe's authority to tax derives...from its power to govern and raise revenues to pay for the cost of government." Id at 33.

455 US at 137, 144.

As early as 1904, the Supreme Court upheld this integral aspect of tribal sovereignty, in spite of vehement protests from non-tribal members. In that year, the Court reaffirmed the power of the Chickasaws to condition non-Indian cattle grazing on their reservation upon payment of a cattle tax, in spite of numerous, strong objections from non-Indian residents who argued the non-Indian resident population in the Indian territory had grown to over 500,000, with only 8,000 people claiming to be Indians who lived on the Chickasaw reservation, and that it was never intended for tribes to have governmental authority over non-citizens. Morris v. Hitchcock, 194 US 384 (1904).

These are not isolated decisions. Several years before Merrion, the Supreme Court upheld tribal taxation of non-members engaged in business transactions on the reservation, stating:

> The widely-held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest, 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855), including jurisdiction to

tax, 23 Op. Atty. Gen. 214 (1900); Powers of Indian Tribes, 55 I.D. 14, 46 (1934). According to the Solicitor of the Department of the Interior:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over non-members, so far as non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions. Ibid (emphasis added)
>
> Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. Buster v. Wright, 135 F. 947, 950 (CA8. 1905), appealed dism'd, 203 US 599, 51 L. Ed. 334, 27 S. Ct. 777 (1906); Iron Crow v. Oglala Sioux Tribe, 231 F. 2d 89 (CA8 1956)....

Washington v. Confederated Tribes, 447 U.S. 134, 152-153 (1980). See also, Kerr-McGee Corp. v. Navajo Tribe, 85 L.Ed.2d 200, 105 S. Ct. 1900 (1985).

The proposed bill is a sketchy, ill-thought-out piece of legislation, with no specific provisions to control the quality, extensiveness, tribal participation, and other critical factors if any such study were to be undertaken. It is premised on a presumption that tribal taxation of non-tribal members is inappropriate, in spite of the long-standing law to the contrary. In the Merrion case, the Supreme Court observed that the existence of Secretarial approval of tribal tax ordinances provided an adequate opportunity for federal review of the propriety of tribal taxation of non-tribal members. 447 US at

141. No one likes to be taxed, and the fact that non-tribal members continue to protest, as they have for almost a century, the imposition of tribal taxes upon them, does not justify this congressional intrusion into tribal sovereignty and Secretarial review authority. This bill is a feeble, poorly conceived effort to single out tribal governments among all others for a diminishment of the inherent authority to tax all persons within their territory.

Finally, we request that a revised bill be considered which would not affect tribal taxes, but would place a moratorium on state and local taxation within Indian reservations pending a study of their effect on the ability of tribal governments to support themselves. The legislation we propose would be consistent with federal policy and would serve to avoid the expense of repeated litigation over state/local taxing authority on Indian reservations.

Thank you for the opportunity to present this written testimony.

DATED this 7th day of November, 1987.

Stanley G. Jones Sr
Stanley G. Jones, Sr., Chairman
Tulalip Tribes of Washington

STATEMENT OF

JEFFREY D. LERNER, GENERAL COUNSEL-TAXES

BURLINGTON NORTHERN RAILROAD COMPANY

Mr. Chairman and members of the Committee, I am Jeffrey D. Lerner, General Counsel-Taxes for Burlington Northern Railroad Company. I appreciate the opportunity to provide this testimony on the impact of Indian tribal taxation on Indian reservations and residents in connection with S. 1039. S. 1039 would provide a two-year moratorium on the approval and imposition of any new tribal tax ordinances; would provide for a Presidentially appointed commission to review the economic impact of tribal taxation upon Indian reservations and residents; and, finally, would provide interim funding during the two-year period of the moratorium. I believe we are at a critical juncture in the evolution of Indian taxation. Unless the steps provided for in S. 1039 are taken, I believe the extent to which the Indians may be able to exercise their sovereign power to tax will be determined, if at all, only after protracted, costly, and potentially bitter litigation. Accordingly, I urge the Committee to support the passage of S. 1039.

Burlington Northern Railroad Company is an interstate rail carrier operating a 25,000-mile system through twenty-five states and two Canadian provinces. Approximately 1,000 miles of Burlington Northern track traverses Indian territory, crossing at least fourteen different reservations in eight different states.

To the best of my knowledge, there has not been--until recently--any effort by the Indians to subject Burlington Northern's property to tribal taxation during one hundred years of rail operation. During the past year, however, two Montana reservations--the Fort Peck and the Blackfeet--have adopted ordinances imposing a property tax upon the railroad's right of way. The reservations have placed a value upon this property identical to the value determined by the State of Montana for state and county property tax purposes. Indeed, this property is already subject to property tax by the appropriate local taxing jurisdictions, and is taken into account for state income tax purposes as well. If the Fort Peck and Blackfeet tax ordinances are upheld, this double taxation will result in additional taxes well in excess of $1 million per year without the provision of any new governmental services. The local taxing jurisdictions presently assessing taxes upon this same property are certainly not going to be willing to relinquish their own taxing powers, at least without the complete elimination of the government services presently being provided to the reservation.

It is my understanding that the Fort Peck and Blackfeet Reservations are not alone in their recent interest in tribal taxation. Federal cutbacks and high unemployment pose a serious economic problem which the reservations must address. If other reservations pass tax ordinances similar to the Fort Peck and Blackfeet, the potential impact upon a captive taxpayer like the Burlington Northern could be devastating.

The general power of the Indian reservations, as sovereign nations, to tax is not subject to legitimate dispute. The United States Supreme Court has held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). Where an Indian tax ordinance has been approved by the Bureau of Indian Affairs, as was the case in the Fort Peck and Blackfeet ordinances, the Supreme Court has further held that the Indians' power to tax is unfettered even by the usual commerce clause considerations to which state taxation of interstate commerce is subjected. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The potential impact of such power is indeed threatening. Approval by the Bureau of Indian Affairs, in Burlington Northern's recent experience, consists of little more than a routine "rubber stamp" at the area director level.

At the same time, however, it is also clear that Indian power to tax is not unlimited. Burlington Northern's recent experience in Montana is perhaps the most vivid example. Burlington Northern has successfully enjoined the imposition of the Fort Peck and Blackfeet taxing ordinances in federal district court. Those preliminary injunctions were based on a finding that the federal grant of the railroad's right of way served to abrogate any sovereign right the Indian reservations otherwise had to tax that property. While that ruling is likely to be taken up on appeal to the United States Court of Appeals and perhaps ultimately to the United States Supreme Court, at the present time neither the Fort Peck nor the Blackfeet Reservations are collecting any taxes from Burlington Northern under their recently adopted ordinances. Quite to the contrary, they have undoubtedly incurred substantial legal fees defending these statutes.

In the absence of any federal guidelines--of which there are presently none--the extent of the Indians' power to tax will undoubtedly be determined only through protracted, expensive and inconclusive court battles such as Burlington Northern is presently engaged in with the Fort Peck and Blackfeet Reservations. In the interim, the Indians are likely to be thwarted in their efforts to collect tax revenues and certain to incur substantial litigating costs.

Overriding this discussion is the fact that Congress, and only Congress, has the power to determine the extent to which the Indians may exercise their power to tax. As the Supreme Court stated in the Merrion case, "Congress, of course, retains plenary power to limit tribal taxation authority or to alter the current scheme under which the tribes may impose taxes." It is, in my opinion, crucial that Congress take the necessary steps to ensure that the Indians exercise their taxing powers in a manner not inconsistent with the superior interests of the United States in protecting interstate commerce or with the long-term interests of the Indians themselves. It would be most unfortunate if the limits of the Indians' power to tax are determined through a series of court battles rather than through Congress's careful consideration of the problem and its passage of legislation setting forth reasonable guidelines and limitations on Indian taxation.

S. 1039, in my view, is a major step toward accomplishing the goal of implementing a fair and reasonable taxing scheme. The proposed moratorium and Presidentially appointed study commission will permit a thorough analysis of a very complex problem. I do not believe the moratorium will deprive the Indians of any substantial revenues they could otherwise have raised, if Burlington Northern's recent experience is any indication. It will, however, avoid the legal fees and bitterness which litigation will otherwise produce.

It is unfortunate that the Indians apparently perceive S. 1039 as being against their best interests. On the contrary, I believe that the end results of S. 1039 will work very much to their benefit. As I stated earlier, I doubt that anyone would dispute the general sovereign power of the Indians to tax. If the result of S. 1039 is the establishment of guidelines and reasonable limitations as to the extent of Indian taxing power, the ability of the Indians to effectively raise revenue and achieve independence through taxation can only be enhanced. Companies like Burlington Northern want only to pay their fair share of taxes--no more or no less. The present situation concerning

Indian taxation is virtually uncharted and without statutory limitation. That is simply not a situation conducive to effective tax administration. S. 1039 is an important first step, at a crucial time, to remedy the present state of affairs. The alternative, as I see it, is not financial security for the Indians, but rather extensive and costly litigation which may never resolve the questions concerning the extent to which the Indians may exercise their sovereign power to tax.

National Rural Electric
Cooperative Association

1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: 202/857-9500

November 10, 1987

Honorable John Melcher
730 Senate Hart Office
Building
Washington, D.C. 20510

Dear Senator Melcher:

Thank you for your invitation to appear at a hearing November 12 on legislation to review the impact of tribal taxation on Indian reservations and residents. Unfortunately, the National Rural Electric Cooperative Association will not be able to appear. Many of my staff and I will be out of town on that date.

I very much admire your courage and skill in bringing up the issue of tribal taxation of privately owned facilities, and I commend you for your efforts. I understand fully that you introduced S. 1039 in order to seek a fair resolution of the tribal taxation issue for businesses, including rural electric cooperatives and Indian tribes. Tribal members are member-owners of rural electric cooperatives, too; thus, the problem of increasing tribal taxation of cooperative facilities is a particularly sensitive one for us.

As a result of efforts such as yours, rural electric leaders in affected states are reexamining their actions in an attempt to avoid a contentious exercise, and to seek harmonious solutions recognizing the rights of both tribal members and consumer-owned utilities. As you know, the Montana Association of Rural Electric and Telephone Cooperatives and the Northwest Public Power Association sponsored an event entitled "A National Forum on the Question of Indian Tribal Rights...As They Present Dilemmas to Consumer-Owned Utilities," September 14-15 in Billings, Montana. A large number of experts who have practical experience in dealing with these matters, as well as Indian leaders and experts, participated in panel sessions and open discussion forums. The discussions were very frank, very informative and, at times, very lively. However, both Indian leaders and cooperative leaders came away with a much better understanding of the rights and problems faced by the "other" side.

One of the things we learned at the Billings conference was how deeply the Indians are committed to their tribal sovereignty rights. They are very willing to negotiate issues like the taxation issue at the local level. However, they see attempts by organizations such as NRECA to go to Congress or federal agencies as an effort to get around tribal sovereignty. Thus, cooperatives have not yet been able to agree on what role NRECA should play at the national or federal level.

This week, managers of statewide rural electric associations from more than thirty states are meeting in Phoenix. The question of what is the appropriate role for NRECA to play in helping resolve this issue is one of the agenda items for this meeting. Jay Downen, Manager of the Montana Association of Rural Electric Cooperatives, is chairman of an informal statewide managers task force to provide an ongoing focus and direction aimed at resolving the taxation issue, and will be a part of the discussions in Phoenix.

Finally, NRECA has in progress a survey of all member systems to determine precisely the impact or expected impact of the new tribal taxation initiatives on our co-op consumers. Unfortunately, this survey is not nearly complete. I will share that information with you when it is available. I am attaching a copy of our survey for your information.

Although NRECA is not able to testify at the hearing before the Senate Select Committee on Indian Affairs on Thursday, please accept my appreciation for your efforts in addition to my commitment to work with you, our co-ops and our Indian members in arriving at a satisfactory solution to the taxation issue.

Sincerely,

Bob Bergland

Bob Bergland
Executive Vice President

BB:mg
Enclosure

National Rural Electric Cooperative Association

1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: 202/857-9500

MEMORANDUM

TO: Member Systems

FROM: Wallace F. Tillman, Senior Regulatory Counsel

DATE: October 30, 1987

SUBJECT: Survey Regarding Indian Issues

A number of NRECA's members have become concerned about Indian Tribal Rights Issues. Among the issues causing the greatest concern are the increasing number of taxes and other revenue raising devices being used on reservations. Generally, the courts have upheld Indians' rights on such matters. To better determine what impact this issue has or could potentially have on member systems, I would appreciate your taking a few moments to fill out the attached survey. A return envelope is enclosed for your convenience.

If your system does not serve or cross over Indian lands, please fill out the bottom portion of this cover memorandum and return it in the enclosed envelope.

Thank you for your attention to this matter.

Cooperative's Name:______________________________

State:______________________________ REA#______

Person completing this survey:________________________

______This cooperative does not serve or cross over Indian lands.

NRECA INDIAN LANDS SURVEY

Cooperative's Name:______________________________ State:____ REA #____
Person completing this survey:__________________________
Address:____
Tel.# (___) ___-________

____

1. Does your cooperative serve Indian lands? ____Yes ____No

If yes, what Indian tribe/organization?________________________

2. Does your cooperative have lines that traverse, but do not serve,Indian lands? _____Yes _____No

4. Has the tribe/organization levied any fees/taxes on your facilities? _____Yes _____No

If yes, what types of fees/taxes? (e.g. possessory interest tax)
____
____
____

If yes, what were the total fees/taxes paid or are expected to be paid in 1987?
Paid:______________ Expected to be paid:_____________

5. How long have these fees/taxes been levied against the cooperative _____________

6. Has your cooperative challenged these fees? _____Yes _____No
If yes, what was the outcome?________________________________
____
____
____

If yes, what attorney represented your cooperative?
Name:________________________________Tel #(___) ___-________
Address:____

7. If no fees/taxes have been levied on your cooperative to date, do you expect them to be levied in the future? _____Yes _____No
If yes, when do you expect these fees/taxes to be levied?
(approximate date) __________

8. How would you describe the cooperatives relationship with the Indian tribe/organization you serve?
_____Poor _____Good _____Excellent

9. Do you have an Indian representative(s) on the Cooperative's Board of Directors? _____Yes _____No
If yes, how many? _______

FOR CLARIFICATION OR FURTHER INFORMATION PLEASE CONTACT DONALD E.SMITH AT:
(202)857-9596

Quinault Indian Nation
POST OFFICE BOX 189 □ TAHOLAH, WASHINGTON 98587 □ TELEPHONE (206) 276-8211

November 25, 1987

Senator John Melcher
Senate Select Committee on Indian Affairs
730 Hart Senate Office Building
Washington, DC 20510
ATTN: Clara Spotted Elk

RE: S. 1039 Tribal Tax Moratorium

Dear Senator Melcher:

The Quinault Indian Nation wishes to comment on S. 1039 which was introduced by Senators Melcher, Baucus and Simpson. The Nation strongly opposes S. 1039 for the following reasons.

S. 1039 amounts to a renunciation of United States policy of self-determination toward Indian tribes. The United States, through Congress and the Executive branch, has consistently encouraged tribal self-government. S. 1039 is paternalistic. It is a throwback to an earlier and unacceptable approach to federal-tribal relations. If tribes are to govern themselves and their reservations, they must have powers of government. The cornerstone of governmental power is the power to raise revenue. Without money, no government can provide services to its constituents.

Tribes face many of the same financial problems as State and local governments. Declining Federal revenues have forced State and local governments to increase the taxes and fees they impose upon residents and non-residents. State sales and income taxes have risen. Cities have increased fees for services and amenities such as garbage collection or park usage.

Some States or cities or parts thereof are as economically depressed as some reservations. Yet, no one has suggested that Congress deprive those cities or States of authority to make revenue decisions because such decisions might be counterproductive for economic activity. It is true that the Federal government has trust responsibilities toward Indian tribes and their people, but trust responsibility is no longer a synonym for paternalism. Congress should not retreat from the policy of tribes governing their reservations.

A recurring argument against tribal taxes is the cry: "Taxation without representation." This motto may have been an effective means of rallying the colonists in the eighteenth century, but its usage today is simplistic and inflammatory.

The Quinault Indian Nation does not make laws in a vacuum. Non-Indians are free to attend the public hearings (which are advertised in the local media) and make their views known. The Quinault Nation is sensitive to the concerns of its members and non-members and considers all comments offered during the Tribal legislative process.

Nearly every citizen of the United States will sooner or later pay taxes to a governmental entity in which he or she has no representational voice. Millions of Americans and foreigners own property in places other than where they reside and pay property taxes without elected representation. Non-residents pay sales taxes and other fees when visiting outside their home States.

Indian tribes, including Quinault, have spent many years and scarce resources developing revenue laws and defending those laws in Federal court. Federal courts have consistently upheld the tribes' right to impose and collect a wide variety of taxes. I enclose a copy of the Ninth Circuit Court of Appeals decision in Snow v. Quinault Indian Nation which involved a challenge of the validity of the Quinault Business License Ordinance. The Supreme Court denied certiorari, letting stand the Court of Appeals decision. The Court of Appeals opinion discusses the long-established sovereign right of tribes to tax.

Many Indian tribes, including Quinault, face problems created by the land ownership patterns on reservations. Approximately thirty (30)% of the Quinault Reservation is held in fee status. Land owners owning fee property pay property taxes. Timber owners pay a state excise tax on timber when it is harvested. We conservatively estimate that between $250,000 and $300,000 in property tax dollars went into State and County coffers from Quinault Indian Reservation fee landowners in 1986. This figure does not include timber excise tax dollars which are also paid on timber harvested from Reservation fee lands. Very few of those dollars come back to the Reservation in the form of services.

Grays Harbor and Jefferson counties acknowledge Quinault governmental authority on the Reservation. For example, both counties look to the Quinault Nation to enforce environmental health law. The Quinault Nation is appreciative that this acknowledgement has occurred. It is, however, a double-edged sword. The Quinault Nation, not the counties, must pay for such enforcement. You are no doubt aware that the Quinault Nation has other governmental obligations which require tribal (not federal) dollars. To support S. 1039 would deprive tribes of the ability to fund programs and services which benefit all residents of the Reservation and are vital to the continued existence of tribes as governments.

Sincerely,

Joe DeLaCruz

Joe DeLaCruz, President
Quinault Indian Nation

JD/sbt

Enclosure

KAW TRIBE OF OKLAHOMA

Drawer 50 • Kaw City, Oklahoma 74641 • (405) 269-2552

October 9, 1987

Senator Daniel Inouye
Senate Select Committee on Indian Affairs
Room 838 Hart Building
Washington, D.C. 20510

Dear Senator Inouye:

This letter is to inform you that the position of the Kaw Tribe of Oklahoma is one of strong opposition to Senate Bill 1039, which concerns itself with the right of Indian Tribes to tax within their own jurisdiction.

President Reagan's Indian Policy Statement of January 24, 1983, clearly affirms the right of Indian Tribes to Self-Government. In 1975, President Nixon's policy of self-determination was signed into law as the Indian Self-Determination and Education Assistance Act.

Since a government-to-government relationship exists between the federal government and the Kaw Tribal government, we feel that the federal government should honor not only its treaty obligations to Indian Nations, but also, be consistant in its adherence to law and policy. To be inconsistant is to foster mistrust and ridicule.

The courts at all levels have consistantly reaffirmed the right of tribal governments to levy taxes. The Indian Tribal Government Tax Status Act is further recognition of tribal status in regard to raising revenue. The Kaw Tribal Council, therefore, would like to go on record opposing the Senate Bill 1039 and we oppose it for the following reasons:

1) Any tax the Kaw Tribe may wish to establish in the future will need to be reviewed and approved by the Secretary of Interior.
    a. This process will take many months.
    b. This will be a great stumbling block for the Administration.
    c. We will be giving up a part of Kaw sovereignty.

2) The governing resolution of the Kaw Tribe does not make allowances for its decisions to be questioned by the Bureau of Indian Affairs or Secretary of Interior.
    a. If this bill passes, the Kaw governing document will need to be revised to allow the Bureau to review certain Council decisions.

3) Any Kaw Tribal tax now in place will need to be repealed if this bill is passed. (Bingo tax, cigarette tax, tax money generated by the nursery.)

4) All Federal Courts have consistently affirmed the sovereign right of Tribes to tax within their jurisdiction.

5) To sell out for the amount of money involved in this bill is to sell a part of the foundation of Kaw Tribal sovereignty. This should be strictly forbidden.

6) The Bill is in direct opposition to President Reagans January 23, 1983 Indian Policy statement.

7) The Bill promotes dependency rather than self-sufficiency among Indian nations; undermines Indian governmental sovereignty, inhibits economic development of Indian governments; undermines the 1975 Self-Determination Concept and promotes an even more entangling surrogate bureaucracy.

8) Further, the Kaw Tribal government recommends that the Federal government divorce itself from the idea that the Indian is not capable of thinking for himself. After all, the concept which gave birth to the American government was based on the political concept of government originated by the Iraquois Confederacy and imitated by Franklin and Jefferson.

We respectfully request and outright demand that Senate Bill 1039 not be passed into law. We firmly believe that such an august body as yourselves can plainly see the irreparable harm and damage this piece of legislation will do to Indian tribal governments.

Sincerely;

W. A. Mehojah
Chairman

The Big Sky Country

MONTANA STATE SENATE

SENATOR R. J. "DICK" PINSONEAULT
DISTRICT 27
BOX 250
ST. IGNATIUS, MONTANA 59865
HOME PHONE: (406) 745-4221
WORK PHONE: (406) 745-2722

COMMITTEES:
EDUCATION, VICE CHAIRMAN
JUDICIARY
LOCAL GOVERNMENT

October 15, 1987

Honorable Daniel K. Inouye, Chairman
Senate Select Committee on Indian Affairs
722 Hart Senate Building
Washington, D.C. 20510

Re: Senate Bill 1039

Dear Senator Inouye:

I contact you in my capacity as a private U.S. citizen who happens to live on an Indian reservation; specifically, the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Lake County, Montana. In addition, I contact you as a member of the Montana State Senate and as a member of the Legislative Committee on Indian Affairs, in which capacity I have served for the past four years.

I was born, raised, and currently reside on this Reservation. My parents, like so many other generations of non-tribal members on this Reservation, came here when the Reservation was opened to white settlement in the early 1900's.

The tax issue that is the primary focus of Senate Bill 1039 is only one of the many critical issues that have come to the forefront in the past five years. Other issues of equal import are the control of the fish and wildlife on the Reservation; the use and distribution of irrigation water; and jurisdiction over non-tribal members for civil actions that arise within the exterior boundaries of the Reservation, to mention a few.

Growing up in this environment, you are exposed to the Indian/non-Indian society at an early age. I will not dwell on that history, because I am sure it has been addressed before your Committee on many occasions. However, I want to preface my following comments with the fact that I have never seen the atmosphere on this Reservation more volatile. There is an increased divisiveness between the tribal and non-tribal members over those issues that I have mentioned above and there have been open threats by the more right-wing element that exists on both sides.

Only recently, when the Confederated Salish and Kootenai Tribes tried to put in place and enforce a hunting and fishing ordinance did matters become so acute that it was necessary for the Governor of the State of Montana to intervene and eventually a compromise agreement was reached to cover the 1987-88 hunting season. This is only temporary and you can rest assured that the issue will arise again in the hunting season of 1988-89. The major issue of compromise was allowing the Tribal officials to enforce regulations on trust land and to allow State game officials to enforce regulations on non-tribal (deeded) property.

Had it not been for these concerted efforts and had the Tribe attempted to enforce their hunting and fishing ordinances as passed by the Tribal Council, I can assure you, and I say this with great concern and anxiety, that there would have been killings on this Reservation! Senator Inouye, I am not an alarmist. With my background as a law enforcement officer and as a practicing attorney in both State and Tribal Courts, my attitude and feelings are tempered in this area and I see deep trouble ahead.

Having made those comments, I then address specifically the substance of Senate Bill 1039 which is, in part, a moratorium on the imposition of any taxes by any tribal sovereignty on non-tribal members who live within the exterior boundaries of their respective reservations. I am quoting Senator Max Baucus' comments that were made on the Senate floor when the Bill was introduced and which are as cogent today as they were 100 years ago, "The power to tax is the power to destroy."

I am a United States citizen who resides on an Indian reservation that is faced with taxes from municipalities, counties, state, the federal government and now some tribal sovereign entity in which non-tribal members have absolutely no voice. If that is not taxation without representation, then I sure in the hell don't know what is! The tribal membership on this reservation comprises less than 15% of the total populace. Although this Tribe has indicated no intention of imposing any taxes "at this time", you can rest assured that when any governmental/sovereign entity, or whatever you call it, has taxing authority that they will eventually use it.

Senate Bill 1039, which requires the Secretary of the Interior to review and approve any proposed Tribal tax ordinance and in addition calls for a two year moratorium concerning the imposition of any new tax ordinances is, to me, a very wise and prudent thing to do. Further, as part of Senate Bill 1039, it is proposed that the President appoint a commission to review the economic impact which tribal taxes as they are proposed, might have on a particular reservation. I think the scope of the Commission's study should not be limited to the tax issues, but the whole spectrum of tribal, non-tribal confrontations that are taking place on all of the Indian reservations in this country.

In addition, I do not think that two years is enough lead time to address even those tax issues that are proposed by Senator Melcher. To address only the tax impact would be a piece-meal approach at best, and would ignore other problems that are as broad in scope and as critical as the tax issue. I enclose for your information a Resolution passed by the State of North Dakota in 1987. That Resolution has the proper perspective.

I would strongly urge an amendment to SB 1039 which would increase the scope of the Commission's inquiry and impose a five-year moratorium, vice two years. Thank you for any time and consideration given to this rather lengthy correspondence.

Very sincerely,

R. J. Pinsoneault
Senator, District 27
RJP/mp

Enc.: North Dakota Resolution

cc: All members of Select Committee
Senator Max Baucus

United Townships Association

TOWNSHIP BOARDS
UTA
GRASS ROOTS GOVERNMENT

Senator Daniel Inouye
Senate Select Committee
on Indian Affairs

Testimony on Senate Bill 1039:

United Township Association (White Earth Indian Reservation) is submitting this testimony on Senate Bill 1039.

The members of UTA at their October 1987 meeting voted not to support S1039 as written. A motion was passed to only support a bill that addresses the alterations of our rights when placed under the jurisdiction of a tribal government.

S1039 instructs the President only to address the economic impact of tribal taxation. This narrow focus does a disservice to not only persons residing within these reservation boundaries, but to the American people as a whole.

It is the interest of all citizens of the United States to guard the freedoms of all people.

The United States Constitution gives powers to the United States government but reserving some powers to the states and to the people. Can the Congress of the United States allow the altering of our rights? Those rights that are reserved for the people and the United States Bill of Rights protect us from detrimental action or lack of action by Congress that affects our freedoms.

We believe that tribal jurisdiction should only cover trust land and members of the tribe. It should not cover Non-Indians or non-member Indians.

We can voluntarily give up our freedoms. But without our consent can we be placed under the jurisdiction of a tribal government? We feel that our consent is a necessary factor and we have not given our consent. It will appear to the courts that Congress by not addressing our valid concerns about the loss of our rights, is accepting that this jurisdiction is correct.

What must be addressed is the larger Constitutional issue. This deals not with treaty law, but the Constitution of the United States, and the actions of the United States government towards non-tribal member citizens' freedoms and or civil rights.

It is imperative that this bill be amended. Instructing the commission to address violations of civil rights caused by tribal jurisdiction over non-tribal members.
Respectfully submitted

Diane Toczek
Rt 2
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"If You Are Not Part Of The Solution, You Are Part Of The Problem"

Totally
Equal
Americans

National
Headquarters
Waubun, MN 56589

Senator Daniel Inouye
Senate Select Committee
on Indian Affairs

Testimony on Senate Bill 1039:

Due to the complexity of Federal Indian Law and it's effect on residents of Indian reservations.

It is necessary that Congress thoroughly address our problems. The diminishment of our civil rights.

More and more we see Congress dealing on a government basis concerning our civil rights with the states, counties, or tribes. Placing more weight on government interest then on the individual's rights.

The United States government has never addressed the alteration of the civil rights of non-Indians or non-member Indians. There have been commissions and analysis of American Indian Policy. In their reports non- Indians and non-member Indians are treated more like chattel then United States citizens.

Citizens of the United States rights under the United States Bill of Rights are disappearing and are being replaced. In this case with the Indian Civil Rights Act of 1968. The American Indian Civil Rights Handbook states "very little interpretative tribal law exists that indicates how the rights contained in the Indian Civil Rights Act specifically apply to actions by tribal governments."

A bill that limits the instruction to the President to the enconomic impact of tribal taxation. And remarks in the Congressional Record that divide up taxes between states, counties, and tribes without the top priority on how all this affects its citizens freedoms is alarming.

Congress needs to amend this bill to expand the Commissions goals to explore the loss of civil rights by residents on Indian reservations due to tribal jurisdiction. Amending this bill is essential to the freedom of eight hundred thousand citizens of the United States.

Respectfully submitted by:

Ann Schoenborn TEA

attachments included:

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WOULD YOU SIGN A BLANK CHECK AND GIVE IT TO A STRANGER?

We can't afford to support a bill we haven't read or researched. Ann Schoenborn of National TEA has researched the Senate Melcher bill and House companion bills.

Sadly we can no longer place our faith and trust in our U.S.Senators and U.S. Congressmen. No longer can we believe that they will protect our **FREEDOMS.** We must take the responsibility to investigate all facets of a bill and envision the worst scenario.

Our present concerns are Senate Bill 1039 and HR 2184 and HR 2185 House companion bills.

Senate Bill 1039 gives an illusion of addressing a problem. It is not explicit in its instructions to Congress or the President. This lack of clear directions concerning non-tribal persons living on Indian reservations is bound to do us more harm than good.

Sec 2 (e) of the bill states "it is essential and necessary that Congress review Indian Tribal authority to impose taxes on non-tribal persons on Indian reservations." Sounds good, but the bill does not instruct Congress that it must do this review, Nor is there a time frame for this suggested review.

Sec 3,4,5, states that the Secretary of Interior shall review and approve all tax ordinances proposed by a tribe on non-tribal persons. The Secretary of Interior already does that. The Secretary of Interior's job is to make sure that the U.S. government is living up to its trust responsibility. "Who in the Department of the Interior is looking out for the constitutional rights of the non-tribal person ?" A question I asked of an Aid to the Secretary of the Interior the answer was **"NO ONE"**. How is the Secretary of the Interior going to balance our rights and the governments trust responsibility? Review by the Secretary of the Interior does **NOT GUARANTEE NO TAXATION!** The Secretary of Interior has already approved changes on tribal constitutions to allow tribes to have jurisdiction over non-tribal persons.

Senator Baucus co-sponsor of this bill in his remarks April 10,1987 congressional Record is more concerned with governments, tribe, local, county, state and the conflicts with double taxation. He also says "The power to tax is the power to destroy". We see that concern in HR 2185 a bill to provide for Non-Discriminatory Taxation of non-Indians. April 28,1987 Congressional Record extension of Remarks outline how taxation by tribal, county,state, local governments could be handled giving us as an example " if states provide a service the tribe need not and vice versa.... and a Revenue Sharing Provision to secure cooperation between states and tribes on tax matters". Thirty-eight congressmen supported HR 2185. Many of these congressmen came from states that do not have Indian reservations. Who asked them to sponsor this bill ?

It seems that Congress has accepted that non-tribal persons should be taxed by tribes. They need a commission to justify removing some taxation powers from the states. Chemehuevi Indian Tribe v California Board of Equalization. The state imposed a cigarette tax on sales made on the Indian Reservation by Indians to non-Indians. The tribe also taxed cigarettes. This double taxation put the reservation retailers at a competitive disadvantage with off reservation retailers. The tribe appealed to the Supreme Court and in May was denied a U.S. Supreme Court review. Indian Reorganization Act and the Indian Financing Act are the Statutes of general applicability, but they do not preempt states authority to tax transactions involving non-Indians.

The courts are not removing double taxation. That leaves it up to Congress. The more revenues the tribes can raise on Indian Reservations the less money the U.S. government will need to provide.

Sec 7 of S 1039 instructs the President to appoint a commission to review the " economic impact " which tribal taxes have on Indian Reservations and report to Congress within a year. The question to raise is why was this limited to the economic impact ? Why not the social impact and the loss of freedoms by non-tribal persons.

We will see with these bills a tug of war between what the states consider their legitimate interest of taxation. And the tribes desires for taxation. And the U.S. government exercising their trust responsibility for the tribes. The tribes views are expressed in " American Indians Time and the Law " the chapter on jurisprudence. We must insist that our interest do not get lost in this tug of war. Our interest go beyond the financial burden of double taxation. We've been told by a group on White Earth that envision themselves as the future tribal council, that when they are in power and we are under their control. They will give us limited citizenship (the right to be taxed). **BUT** only after we have undergone extensive reconditioning. Then **MAYBE** we'd be allowed to vote.

There has been a Presidential Commission on Indian Reservations Economies in 1984 from the tribal perspective. Pages 38,73 and 74 deal with the non-tribal persons, government conflicts and double taxation. The recommendation of the Commission is:

> That legislation be introduced which permits Indian tribes to hold referenda in which all the franchised voters resided within the exterior boundries of a Federal Indian Reservation, may by majority vote, accept the exercise of exclusive tribal government taxation authority and the responsibility for the provision of public service to all people: the effect of which referenda shall be to preempt state taxing jurisdiction; and that such legislation not limit the power of tribes to enter into local service agreements with other units of states or local governments.

Interesting recommendation! I imagine that would be the first and last time we would be allowed to vote. The commission made the statement that there are more non-Indians living within the borders of Indian reservations than there are Indian residents. Montana v U.S. (1981) U.S.Supreme Court outlined how we can be placed under the tribes jurisdiction. Its simple we can agree to be placed.

What happens when you are under the jurisdiction (taxation) of a tribal government. All rights we have under the United States Bill of Rights **VANISH**. They do not exist for us when dealing with tribal governments. What takes their place are the rights under the Indian Civil Rights Act of 1968. Those rights do not include the right to vote.

These bills need to explicitly address and direct Congress to deal with our valid concerns. We can not support a bill that does not address our **CIVIL RIGHTS**. The bills need to be amended to read.

> "Congressional or Presidential Commission be appointed to review and report to Congress on how tribal jurisdiction affects the freedoms of non-tribal persons on or near Indian reservations by placing them under the Indian Civil Rights Act of 1968 and removing from them the freedoms afforded them by the United States Bill of Rights. This to be given to Congress within one year after enactment of the Act."

We need also to be protected on who is going to serve on the commission. The 1984 commission did not have one non-Indian that lived on a Indian reservation.

We cannot support these bills without these provisions. The wording is important in bills. Our problems go further than just paying out moneys to a tribal government. Even with these provisions we need to reserve the right to withdraw our support. Bills have a habit of changing raDICALLY IN COMMITTEE. If you blanketly support a bill, you may discover to your regret the bill that passed is one you cannot live with.

We live in the United States and are U.S. citizens. We cannot allow Congress to compromise us. We cannot allow ourselves to forget what a compromise will do to our freedoms. This is the year of the U.S. Constitution. Our Founding Fathers felt strongly about the importance of the attachment of the Bill of Rights to the Constitution. Its nice to draw an imaginary line around our own world and not step out of those self-imposed boundaries. We can stay within those boundaries while apathy, disinterest or faith that Congress will do right by us, only to watch our freedoms disappear under the name of economic impact.

We have boundless freedoms in the United States, but that does not mean that we cannot lose them. We can no longer be spectators with our future, but participants in our future. There cannot be a tax on non-tribal persons by tribal governments. We must insist that these bills provide explicit protections for us.

Congress may envision a controlled taxation that will create or maintain a stable economy on these reservations. But that would be temporary at best The future of any community is the children. My children will not be allowed to stay on White Earth if they do not have their freedoms.

Economic stability without freedom is an illusion of peace.

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May 20, 1987

FEDERAL EXPRESS

Honorable Harry Reid
United States Senator
708 Senate Hart Building
Washington, D.C. 20510

RE: Pyramid Lake Paiute Tribe Tax Code

Dear Senator Reid:

Thank you for meeting with Fred Crosby and me in Reno on April 15, 1987. As you will recall at that meeting, you asked that I provide you with additional information on the Pyramid Lake Paiute Tribe's Tax Code and on the general issue of tribal sovereignty over nonmembers of the Tribe. As is apparent below, the situation relative to the Pyramid Tribe, their Reservation, their Tax Code and its impact on nonmembers of the Tribe is not unique.

Background.

For four generations, my family has been in the livestock business at Wadsworth, Nevada and elsewhere. On Friday, February 26, 1982, members of my family and many others received "Dear Taxpayer" letters from the Pyramid Lake Paiute Tribal Council. Also enclosed was a document referred to as the Pyramid Lake Indian Reservation Tax Ordinance. For your information, copies of those documents are attached as Exhibits "A" and "B".

Although the Code is lengthy, it generally purports to impose what amounts to a gross income tax (labeled a business and occupation tax) on nonmembers of the Tribe who make their livelihood within the exterior boundaries of the Pyramid Lake Indian Reservation. The Code also purports to impose a property tax on utility and railroad easements and property (labeled an easement tax).

By the time my family and others affected by the Tax Code were made aware of it, it had already received the necessary review and approval from the Interior Department. Neither I, my family, nor anyone else affected had an opportunity to present our views to the Secretary or his delegate. We had no advance notice of the existence of this Tax Code. Attached hereto as Exhibit "C" are excerpts from a brief which I have written in the pending action in the United States District Court of the District of Nevada. Pages 27-29 of Exhibit "C" describe the manner in which this Tax Code was approved.

The Pending Litigation.

In September of 1982, the Tribe commenced an action against "selected taxpayers" seeking to establish the validity of the Tax Code. Pages 30-37 of Exhibit "C" describe the "selected taxpayers" I represent and their businesses. In that litigation, I joined the Secretary of the Interior as a third party defendant contending that his approval of the Tax Code was unlawful.

In 1984, the Tribe and the Secretary of the Interior moved for Summary Judgment. I opposed both motions. On April 29, 1987, the court entered its Orders On Motions For Summary Judgment. A copy of that decision is attached hereto as Exhibit "D".

The Court's decision is significant and highlights the need for comprehensive federal legislation. First, the decision grants summary judgment to the Secretary of the Interior. The Court's holding confirms the fact that the Secretary of the Interior when approving tribal ordinances affecting nonmembers of a tribe need not consider the interests of the affected nonmembers.

The Court's decision with respect to the Tribe's inherent authority to tax is very broad. The holding seems to be that a tribe may tax nonmembers within the reservation boundaries simply because it needs money.

The Court also held that a tribe is not bound by the limitations imposed by the United States Constitution on state and federal government. Thus, the only constraint on tribal power is the Indian Civil Rights Act (ICRA) 25 U.S.C. §1302. As you can see from the Court's decision at pages 28-38, the Indian Civil Rights Act cannot be used offensively as a sword in federal court and there are serious questions as to whether it may be used defensively as a shield.

In applying the equal protection provisions of the ICRA, the Court considered my clients as "aliens." The irony of that classification is that all are citizens of Nevada and the United States. It is impossible for them to become "citizens" of the Tribe. Thus, at a time when Congress has legislated to allow millions of illegal aliens to become citizens, my clients, whose families have been in the United States for generations and who have fought in foreign wars to preserve freedom and justice, are "permanent aliens."

Although the Court has ruled in favor of two of my clients and has given a favorable indication of how it will rule on the ICRA defense of euqal protection, I fully expect an appeal in this case. In addition, a ruling on the equal protection defense does not prevent the Tribe from enacting a new tax code.

The Historical Facts Which Give Rise To This Problem In The West.

As a result of my research, it has become apparent to me that this is not a localized problem. It is pervasive throughout the western United States. For example, in the case of *Knight v. Shoshone and Arapaho Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), the tribes in question had enacted a tribal zoning ordinance affecting fee lands owned by non-Indians within an Indian reservation in Wyoming. In *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir. 1982), the Quinault Tribe of Washington had enacted building, health and safety regulations applicable to fee land owned by non-Indians within that reservation. In *Southland Royalty Company v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983), the Navajo Tribe in Utah had enacted a tax on the value of mineral interests and on gross receipts. No doubt there are many other examples of an Indian tribe's exercise of civil authority over nonmembers. *See*, *e.g.*, *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985).

In a recent opinion of the Supreme Court of the United States, Justice Marshall explained why there are nonmembers of tribes owning, living and working on fee land within Indian reservations. He noted that, as a result of the pressure to have Indian tribes abandon their nomadic lives and to settle into individualized farming, Congress passed a series of surplus land acts at the turn of the century. He stated:

> The modern legacy of the surplus land acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the acts and have since passed out of Indian ownership. As a

> doctrinal matter, the states have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state and tribal authorities share jurisdiction over these lands if the relevant surplus land act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U.S.C. §1151(a). [Citation]
>
> Unfortunately the surplus land acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land acts were passed the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree opened lands that had not yet been claimed by non-Indians. [Citation] Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. [Citations]
>
> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed to a man that within a short time - within a generation at most - Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one

> reservation. Solemn v. Bartlett, 465 U.S. 463, 467-68 (1984).

Justice Marshall's comments about the belief of members of Congress applies to various Congressional acts dealing with the Pyramid Lake Indian Reservation. Those members of Congress' beliefs no doubt were shared by persons who acquired land under the various acts. Pages 3-27 of Exhibit "C" describe the history of the Pyramid Lake Indian Reservation. That history explains how my clients and others came to own the property on which they live and work.

The Need For Legislation.

The law with respect to tribal sovereignty is primarily court made. As such, it has developed on a case by case basis. This area of the law is not well suited to piecemeal development. The entire area of tribal sovereignty over nonmembers requires comprehensive legislative study and action. Only in that forum can all aspects of that sovereignty and its impact on nonmembers of a tribe be studied and evaluated.

In my judgment, in the area of civil rights, Congress should subject the actions of Indian tribes with respect to nonmembers to the restrictions of the United States Constitution. Congress should give United States District Courts jurisdiction to enforce the Indian Civil Rights Act against Indian tribes in actions involving nonmembers. I find it incomprehensible that there are lands in this great country where United States citizens are not afforded the protection of the Constitution of the United States.

Second, with respect to tribal authority over persons acting on and activities taking place on fee lands within the exterior boundaries of Indian reservations, Congress should by statute exclude that land from the reservations and should provide that tribes have no sovereign power in such cases. Such action would be entirely consistent with the intent of those Congresses who made it possible for nonmembers to own land within reservations. It would not affect tribal self-government. I know of no state in the union whose laws are inadequate to protect the political integrity, economic security, health and welfare of Indian tribes from activities taking place on fee lands in or adjacent to an Indian reservation.

Third, with respect to the activities of nonmembers on tribal lands, I see no reason why tribes should not have authority over such persons similar to the authority a state exercises over visiting citizens of another state. Thus, tribes would have significant power over nonmembers acting on tribal lands.

As you can see, I believe the greatest protection must be afforded to nonmembers of a tribe acting on their own property, the so-called "permanment alien." These persons are not and cannot become tribal members. They are prohibited by the tribal constitutions from voting in elections for membership to tribal governing bodies, from becoming members of those bodies, and from otherwise participating in tribal government. It is ironic that 211 years after the Declaration of Independence, a government may govern without the consent of the governed. These issues are as significant to the persons affected as was the quest for basic civil rights by blacks in the 1960's.

These are just a few ideas that I have at the present time. No doubt, they require careful study and consideration. None of these suggestions in any way impairs the rights of Indian tribes to regulate their own internal affairs and trust property.

I am willing to come to Washington to discuss this matter further with you or with your staff and with other legislators and their staffs, if you think it would be productive. As always, your help and consideration is greatly appreciated.

Best regards.

Sincerely yours,

Gordon H. DePaoli
Gordon H. DePaoli

GHD/emr
Pl 7
Enclosures

cc: Fred Crosby (w/encls.)

MEMORANDUM

TO: Senate Select Committee on Indian Affairs

FROM: Gover, Stetson & Williams, P.C.

RE: **Briefing Memorandum for November 19, 1987 Hearing on S.1039: To Review and Determine the Impact of Indian Tribal Taxation on Indian Reservations and Residents**

DATE: November 3, 1987

I. INTRODUCTION & SUMMARY

S.1039 would impose a two year moratorium on new tribal taxes applicable to non-Indians in Indian Country, during which time a special commission would be constituted to study the economic impact of such taxation. Also, during this time appropriations are authorized to offset the loss of tribal tax revenues needed for essential governmental services provided by tribes to reservation residents. S. 1039 also would require Secretarial approval of any tribal tax ordinance. This memorandum summarizes the law governing Indian tribes and states' authority to tax persons, activities and property within Indian Country. This memorandum also summarizes the tax efforts in Indian Country to date.

In sum, the United States Supreme Court has made clear that Indian tribes possess the inherent sovereign power to tax Indians and non-Indians within Indian country. The Supreme Court has made equally clear that, absent federal consent, states do not possess authority to tax Indians in Indian Country. The law governing the authority of states to impose taxes upon non-Indians within Indian country is less clear; what law exists, however, shows that states have limited authority to impose such taxes. This is so significant in part because tribes provide the non-Indians in Indian Country with governmental services that the states do not provide; the non-Indians also typically are involved in activities that have some effect on Indians within Indian country.

The relatively greyer area of the law governing the power of states to tax non-Indians within Indian country has spawned unique burdens for these non-Indians. That is — both states and tribes typically seek to impose taxes upon non-Indians in Indian Country, thereby subjecting these taxpayers to uniquely high tax burdens, not experienced elsewhere in the United States. This is so even though, by far, tribal tax rates are lower than the state and local tax rates imposed upon non-Indian taxpayers in Indian Country. While tribes provide important governmental services to these non-Indian taxpayers, states rarely provide, and local governments only to a small extent provide, governmental services to these taxpayers.

Indian tribal governments are exploring a number of avenues to eliminate or reduce the uniquely high tax burdens experienced by non-Indians in Indian country, because these tax burdens impose competitive disadvantages on these taxpayers and interfere with tribes' ability to impose taxes for the services they provide. Some tribes are choosing to litigate against a state's application of its taxes to non-Indians on the grounds that the taxes are federally preempted and infringe upon tribal sovereignty. Other tribes are exploring intergovernmental tax agreements based on the facts relevant to particular tax efforts. This memorandum concludes that because of the vast diversity in the taxing circumstances in Indian Country, which circumstances make practically impossible and unfair a uniform approach to resolving the emerging issues, Congress ought to promote discussions between tribes, states and other local governments regarding taxation in Indian Country.

II. ANALYSIS: THE LAW

Since the turn of the century, Indian tribal governments' taxation of both Indians and non-Indians within Indian country has been upheld by the United States Supreme Court. Indian Country is defined at 18 U.S.C. §1151 and includes fee land and trust land within a reservation, trust lands outside a reservation and dependent Indian communities outside a reservation. This territory has been held subject not only to federal criminal jurisdiction but also to tribal jurisdiction. _Decoteau v. District County Court_, 420 U.S. 425 (1975). In one of the earliest cases, _Morris v. Hitchcock_, 194 U.S. 384 (1904), the United States Supreme Court upheld a tribal tax on livestock owned by non-Indians in Indian Country. Most recently, the Supreme Court upheld a tribal tax on non-Indians severing minerals from lands leased to them by Indian lessors. _Merrion v. Jicarilla Apache Tribe_, 455 U.S. 130 (1982); _Accord_, _Barta v. Oglala Sioux Tribe_, 259 F.2d 553 (8th Cir. 1958), _cert denied_, 358 U.S. 932 (1959) (tribe may impose a business license fee upon non-Indians); 55 Interior Department, 14, 46 (1934) (Powers of Indian Tribes); _Washington v. Confederated Colville Tribes_, 447 U.S. 134 (1980) (tribe may tax cigarette sales to non-Indians). And, importantly, the Supreme Court also has made clear that tribal taxes are not subject to the review and approval of the Secretary of the Interior, unless tribal law imposes such a requirement. _Kerr-McGee Corp. v. Navajo Tribe of Indians_, 471 U.S. 195 (1985). _Kerr-McGee_, of course, is quite complementary to the federal policy supporting greater tribal self-determination and freedom from federal governance of Indian Country.

In administering their taxation programs, Indian tribes are subject to two forms of limitation on the exercise of their powers. First, Indian tribes are subject to the constitutional type limitations contained in the Indian Civil Rights Act, 25 U.S.C. §§1301-1303. Under this law, tribes are required, _inter_ alia, to pay just compensation for the taking of property, and are required to accord all persons the due process of law and the equal protection of law. In addition to the Act, many tribes have imposed under tribal law certain limitations on the exercise of tribal powers by their tribal governments. Many tribal constitutions, for example, contain rights to the due process of law and the equal protection of law. Consistent with these laws, Indian tribes regularly have provided ample opportunity for the public to comment on proposed taxation ordinances and regulations for these ordinances through public hearings and written comment periods. Some of these experiences are described more fully below in Section Three of this memorandum.

Tribal jurisdiction over non-Indians in Indian Country in non-tax contexts has been upheld by the Supreme Court subject to two limitations that some analysts believe are relevant to tribal taxing jurisdiction. First, the Supreme Court has held that tribal authority to prosecute and convict non-Indians who commit crimes in Indian Country against tribal law was surrendered implicitly when the tribes came under the sovereignty of the United States. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In Oliphant, the Court was persuaded by numerous federal laws that appeared to remove impliedly from Indian jurisdiction, criminal jurisdiction over non-Indians. We know of no tribal tax code that fails to recognize this limitation.

With respect to the other limitation on tribal jurisdiction over non-Indians, in 1981, the Supreme Court held that the Crow Tribe lacked jurisdiction to regulate hunting and fishing of non-Indians on fee lands within the Crow Reservation. Montana v. United States, 450 U.S. 544 (1981). In Montana, the Tribe historically had not exercised jurisdiction over non-Indian hunting and fishing on fee lands, and federal statutes had sanctioned explicitly the regulation of such activities by the state. See, United States v. Montana, 457 F.Supp. 599, 610 (D.Mont. 1978). Accordingly, the Court concluded that insufficient tribal interests were at stake so as to justify tribal jurisdiction over non-members in these circumstances. The Court articulated a new rule for determining the jurisdiction of tribes over non-Indians on fee lands in similar circumstances. The Court, specifically, held that tribal jurisdiction over non-Indians on fee lands within Indian country will exist where the non-members are: (1) transacting business with the Indians; or (2) engaged in activities which could have a direct impact on the political or economic integrity, or health and welfare of the Tribe. Taxation of non-Indians even on fee lands in Indian country presents a case not easily susceptible to analysis under Montana. Taxation is needed to raise revenues for services such as police and fire protection or employment opportunities provided to non-Indians and Indians alike. Whether or not the non-Indians on fee lands have sufficient significant contacts with the tribe so as to justify general tribal jurisdiction over them arguably is irrelevant when considering that these persons enjoy tribal governmental services for which they properly should pay. Stated differently, Montana focuses upon the activities of non-Indians and whether those activities impact significant tribal interests so as to justify tribal regulation. In contrast, for taxation purposes, the activities of non-Indians are irrelevant since the tribes provide services of a both general (and thus non-segregated) and specific nature to them irrespective of the non-Indians' activities. In short, Montana plainly is inapplicable to the analysis of tribal taxation jurisdiction on the reservations, and, accordingly, tribal power to tax non-Indians on trust lands or fee lands within Indian Country is now beyond question.

In stark contrast, the power of states to impose their taxes upon persons and activities within Indian country is far more restricted. Indeed, states wholly lack the power to impose taxes upon Indians within Indian country absent express congressional consent. Accord, McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). In non-tax contexts, state efforts to impose jurisdiction over Indians in Indian Country will be subject to a balancing of federal, state and tribal interests to determine whether the weight of the state interests sufficiently justifies the asserted state jurisdiction. See, California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083 (1987). Of course, Congress has plenary power to authorize state taxation of Indians within Indian Country, provided such an authorization would further the trust responsibility of the United States to assist Indian tribes in achieving greater self-determination. See, Morton v. Mancari, 417 U.S. 535 (1974); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

State jurisdiction to tax non-Indians within Indian Country is subject to a vastly complex set of rules which erect two independent but related limitations to such jurisdiction. Specifically, state taxing authority over non-Indians within Indian country may be invalidated on the grounds that (1) it is preempted by federal law, Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 837 (1982), or (2) it infringes upon tribal self government. Williams v. Lee, 358 U.S. 217 (1959).

In determining whether the foregoing limitations exist with respect to state taxes in particular cases, the Supreme Court is guided by three important principles. First, where important federal laws and regulations are pervasive with respect to the activity of non-Indians proposed to be taxed, the Court has held that no room is left for the additional burden of state taxation. Warren

Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965). In Warren, the Supreme Court invalidated a state gross proceeds tax imposed upon non-Indians trading with Indians on a reservation. The Court reasoned that, because trade with Indians is pervasively regulated by the federal government pursuant to the trader statutes, no room is left for state taxation because such taxation would interfere with the federal plan for protecting Indians from unfair prices. Second, in the absence of pervasive federal law or regulation, the federal preemption and infringement analyses are controlled not by absolute conceptions of state or tribal sovereignty, but instead by a particularized examination and balancing of the relevant state, federal, and tribal interests against a backdrop of tribal sovereignty which federal law has recognized and encouraged. Ramah, 458 U.S. 838; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980). Finally, any ambiguities in the relevant federal laws or policies which reflect the federal and tribal interests to be weighed in the Ramah balancing test must be construed generously in favor of the Indians. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); Bryan v. Itasca County, 426 U.S. 373 (1976).

Set forth below are the interests to be balanced in the determination of whether state taxing jurisdiction lies over non-Indians in Indian Country.

1. Does the activity to be taxed involve "reservation-generated value"?

Since 1980, the courts have distinguished between value produced off-reservation but marketed on-reservation, and value produced and marketed on-reservation. Where the value to be taxed is produced and marketed on-reservation, the case for voiding state taxation is strong.

In Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980), ("Colville") the Supreme Court upheld a state sales tax imposed upon non-Indians purchasing cigarettes from Indian retailers on the reservation, notwithstanding the fact that the combination of the state and tribal taxes imposed on such sales likely would eliminate the tribal cigarette commerce with non-Indians. The Court noted that such commerce existed only because the Indians were marketing their immunity from state taxes, and not because purchasers were interested in products produced on the reservation. Significantly, the Court observed that the tribal interest in raising revenues for governmental programs is strongest, and the state's similar interest weakest, where the revenues are derived from value generated on the reservation by activities involving the tribe. 447 U.S. at 156-157.

In contrast, compare Colville with Crow Tribe of Indians v. State of Montana, 819 F.2d 895 (9th Cir. 1987). In Crow Tribe, the taxation revenues sought by the state from non-Indian coal lessees ultimately were traced to the Tribe's mineral resources. The Ninth Circuit Court of Appeals, in its first opinion at 650 F.2d 1104, 1116 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982), reasoned that any substantial incursion into those resources cuts to the heart of the Tribe's ability to sustain itself. The Court, therefore, remanded the case back to the district court to find additional facts, including whether the State taxes substantially affect the Tribe's ability to offer governmental services, its ability to regulate the development of tribal resources, or whether the balance of state and tribal interests renders unreasonable the State's asserted right of taxation. 650 F.2d at 1117. Following the trial on remand, and on appeal, the Ninth Circuit, armed with additional facts, recently confirmed its earlier impressions by striking down the state tax. The Court reasoned that the state's 32.9% tax rate, which had the effect of substantially reducing tribal income from the mineral resources, was not justified by significant state services or other interests.

2. Does the asserted state taxation thwart important federal laws?

When a tribe can demonstrate that state taxation conflicts directly with federal policies embodied in specific federal laws, state taxation is likely to be disallowed.

In at least two cases courts either have struck down or questioned (in the absence of adequate factual support) state taxes imposed upon non-Indians on a reservation because, inter alia, the taxes conflicted directly with the clear mandates of relevant federal laws. In White Mountain Apache Tribe v. Bracker, supra, the Supreme Court held that federal law preempted Arizona's motor carrier license and fuel use taxes as applied to a non-Indian logging company hauling logs on an Indian reservation for the Tribe's timber enterprise. The Court reasoned that the State taxes, which would be passed on to the enterprise in the form of higher prices, would cut into the Tribe's profit from its timber resource and, therefore, conflict with federal regulations requiring that tribal timber be developed so that Indians receive the greatest profit from the timber. Id. at 147.

Similarly, in Crow Tribe of Indians v. State of Montana, supra, the Ninth Circuit observed that Montana's high severance tax imposed upon non-Indians mining Tribal coal conflicts with goals of the Mineral Leasing Act of 1938, including the goal ensuring Indians receive the greatest return from their property. The court reasoned that the magnitude of the state tax ($27 million annually as compared with Tribal royalties of $8 million annually) likely would prevent the Tribe from realizing a large portion of the economic benefits of its coal resource, thereby thwarting the Act's goals of revitalizing tribal government, encouraging tribal economic development, and ensuring Indians receive the greatest return from their property. 819 F.2d at 898, 901, 902. The court also observed that the State tax regulates the development of tribal resources and preserves the wealth from such resources for future state citizens, in conflict with the goals of the Indian Mineral Leasing Act of 1938. 819 F.2d at 898.

In Ramah Navajo School Board v. Bureau of Revenue, supra, the Supreme Court struck down a state tax imposed on a non-Indian construction company's gross receipts received from an Indian school board — which had contracted to operate a formerly BIA-operated school — for construction of a school on the Reservation. The Court reasoned that the tax would impede the important federal interest in promoting the quality and quantity of educational opportunities for Indians in that the tax would deplete the funds available for the construction of Indian schools. 458 U.S. at 842.

3. Does the state have any legitimate regulatory interests in connection with the activity sought to be taxed?

In Crow Tribe of Indians v. State of Montana, supra, the Ninth Circuit held that the State had no legitimate regulatory interests supporting its tax on non-Indian coal producers on the Reservation, since the regulatory purposes of the state's tax were to regulate the pace of mineral extraction and preserve the wealth from non-renewable resources for future state citizens. The court concluded that the Tribe, and not the State, has legitimate claim to regulate or preserve Indian-owned wealth. Id. at 902. The court also observed that mining on the reservation conceivably could cause significant environmental effects off-reservation, thereby imposing costs upon the State which might support state taxation of the mining activities. The State, however, failed to prove the existence of these costs. The court, therefore, found that the state tax was too high and not tailored carefully to effect legitimate State interests because the revenues appeared to exceed greatly any state costs associated with the mining.

4. What services, if any, are provided by the federal, tribal and state governments to the non-Indians sought to be taxed by the state?

One of the most weighty of the State governmental interests to be balanced in the calculus of whether particular state taxes may be imposed upon non-Indians in Indian Country is the extent to which on-reservation services are provided to the non-Indian taxpayers by the State. Notably, this interest was considered significant in all of the decisions concerning state taxation on Indian reservations.

In Colville, where as noted earlier, the Supreme Court upheld a state sales tax imposed on non-Indians purchasing cigarettes from Indians on the reservation, the Court observed that a state has legitimate interests in raising revenues from activities on a reservation where the non-Indian taxpayer is the recipient of state services. 457 U.S. at 155. Accord, White Mountain, supra, at 150; Warren Trading Post, supra, at 691; Ramah Navajo School Board, supra, 458 U.S. at 843. Moreover, even if state services are provided to the taxpayer, the tax is valid only if the revenue collected bears some relationship to the actual governmental costs associated with the activity sought to be taxed and if the tax is narrowly tailored to achieve legitimate interests. See, e.g., Crow Tribe, supra, at 901-902. While federal law probably does not require equivalence between the taxation revenues and costs, some rational relationship between these factors surely will be required. Merrion v. Jicarilla Apache Tribe, 455 U.S. at 158, n. 26 (1982).

In addition to the claim that a state tax is void altogether, an alternative claim may be available that such tax nonetheless must be limited under federal law. Specifically, in Colville, the Court in dictum observed that in certain circumstances a state may be required to offer a credit for tribal taxes paid, thereby making equivalent the tax burden imposed on and off Indian Country.

447 U.S. at 157-158. The Court stated such a credit might be required where the Tribe can show that the business taxed by the state would suffer without a credit. Stated another way, if the Tribe had shown that by failing to offer a credit the state hinders sales in Indian Country, the Court likely would have imposed a credit requirement. In Colville, a credit was not required because the Tribe failed to prove that the double taxation would hinder the sales at issue.

To summarize the law on the subject of state and tribal taxation of non-Indians in Indian country, tribal authority over both Indians and non-Indians in Indian Country has substantial basis in law and fact. State authority, on the other hand, does not exist with respect to Indians and is subject to a set of rules which properly serve to limit state taxation of non-Indians within Indian country. The uncertainty of state tax obligations applicable to non-Indian taxpayers and the imposition upon such taxpayers of both state and tribal taxes in many instances yields most unfortunate results as will be described more fully below.

III. ANALYSIS: THE EXPERIENCE

Like their state and other governmental counterparts, many Indian tribes now have active taxation programs in place. These tribes, prior to adopting taxes, typically have proposed them to the general public for comment and an opportunity to be heard. In addition, prior to adoption of regulations for such taxes, the tribes typically have invited public comment. For example, in 1978 the Navajo Tribe proposed a business activities tax and a possessory interest tax. These laws, as well as the regulations for them, were available for numerous public opportunities to comment. Indeed, the public comments proved quite helpful and the regulations were amended accordingly by the Navajo Tax Commission. In addition, through the lobbying of numerous construction industry taxpayers, the

Navajo Tax Commission became aware of the need for special tax statutory considerations for the construction industry. Accordingly, in 1984, the Navajo Tax Commission proposed statutory amendments that were adopted by the Navajo Tribal Council to authorize special rules with respect to the construction industry's payment of Navajo business activity taxes.

In 1987, the Wind River Tax Commission proposed regulations for the Shoshone and Arapahoe Tribes severance tax. Throughout 1987, the Commission has labored to tailor regulations that are comprehensive and yet comprehensible to taxpayers. Opportunities for written comments as well as a public hearing were offered by the Commission with respect to the proposed regulations. The results of this dialogue with largely non-Indian taxpayers are being described in a final regulation that will contain a preamble setting forth the public comments and the Commission's response to them.

In 1986, the Crow Tribe began considering the possibility of enacting a tax and proposed to the general public on the Crow Reservation several possible taxes for this purpose. The intention of the Crow Tribe was to obtain the reaction of the public to the various taxes before selecting which, if any of the taxes, would be adopted by the Crow Tribe. To date, the Tribe still has not made a final decision on an appropriate tax.

In short, the prevailing practice in Indian country is very comparable to the practice in other jurisdictions with respect to providing effective public participation in the adoption of statutes and regulations on taxation. And, importantly, tribes have regulations or other procedures that permit taxpayers to appeal tax determinations within an administrative and, typically, also a judicial appeals process.

Generally, tribal taxation rates are far lower than their state and local government counterparts. In a study conducted by the Council of Energy Resource Tribes in 1983, the Council discovered that tribal taxation rates typically are in the range of one to five percent, with a couple of exceptions. Those exceptions involve unique circumstances where tribes were laying the foundation for preempting state taxes and, accordingly, raised their taxation rates. "Taxation Workshop Report," Council of Energy Resource Tribes, 1983; "Tribal Resource Development: Agreements, Taxation and Regulation," Council of Energy Resource Tribes, 1983. These studies are attached to this memorandum.

As a result of the combination of the state and tribal taxation rates, many non-Indian taxpayers in Indian Country face uniquely high tax burdens. Ironically, notwithstanding these burdens which result largely from the imposition of relatively higher state taxes, the reservation taxpayers appear not to be enjoying commensurate services provided by the states or local governments. Although the data is scarce on this score, a number of studies were completed for the Navajo Tribe in 1983 on the relationship of state and local government tax collections and services with respect to Navajo Indian Country. In one of those reports, the conclusion is reached that residents of Indian Country enjoy modest contributions from state and county governments when contrasted with federal contributions and other tribal budget sources. This study also concluded that the service levels provided by the state and county are modest when compared with county and state services provided to other parts of the county and state. "Arizona State University Final Report on Arizona's Northeastern Counties for Governor's Task Force on Northeastern Counties," Center for Public Affairs, Center for Urban Studies, Bureau of Business and Economic Research, Arizona State University, Tempe, Arizona, 1983. This study and the information upon which the study conclusions were based are attached to this memorandum. Of particular interest is the February 7, 1985 letter to Mr. Clarence Bigelow, Apache County manager, from the financial affairs advisor for the Arizona State Senate. In that letter at page 5, the advisor notes that the Apache County collections from Navajo Indian Country are about twice the services delivered.

Similarly, a study conducted in 1985 of the expenditures of Apache County in Northern Arizona, which county is comprised in large part of Navajo Country, concluded that roughly thirty-seven percent of the county revenues were spent for direct and indirect services in the Navajo Country in fiscal year 1984 and 1984. Yet, the population for Navajo Country was approximately double that of the non-reservation areas of the county. "Apache County Expenditure Analysis of On- and Off-Reservation, Fiscal Year 1983 and 1984," submitted to Joint Study Committee, March 12, 1985, a copy of which is attached to this memorandum.

In the same vein, the State of Wyoming for the period of 1974 through 1983 collected approximately $50 million in severance taxes on oil and gas produced on the Wind River Indian Reservation. Of that amount approximately $20 million remains on deposit in the State's permanent mineral trust fund and is not distributed to the reservation taxpayers. Not clear is what portion of the severance taxes expended were delivered to the taxpayers in Wind River Indian Country. In addition, for the period 1974 through 1983, Fremont County, the county inclusive of Wind River territory, collected ad valorem property taxes on natural gas and oil produced on the Wind River Reservation of about $31 million. "Ad Valorem and Severance Tax Study," Prepared for Wyoming Indian Board of Trustees, Fremont County School District No. 14, Wind River Associates Study, 1985. What portion of these ad valorem taxes were distributed back to taxpayers in Wind River Country is not at all clear. In sum, despite considerable state tax collections from non-Indian taxpayers in Indian Country, very little of those collections are returned to such taxpayers in the form of services. This inequity troubles increasingly the Indian tribal governments most directly responsible for these taxpayers' interests.

Specifically, many non-Indian economic activities in Indian Country have been made relatively less competitive than their non-reservation counterparts due to the multiple and unique tax burdens imposed upon them. For example, these burdens depress new exploration and production in the case of oil and gas. The burdens also reduce the opportunities for the tribes to raise their tax rates and thereby provide improved services to such taxpayers, and reduce the employment opportunities available both to Indians and non-Indians. In response, many Indian tribes have undertaken measures to eliminate the multiple taxation of their non-Indian taxpayers. Several tribes, for example, are suing states on the grounds that the state taxes are federally preempted or infringe upon tribal self-government as a matter of federal law. A recent decision cited in Section II of this memorandum, Crow Tribe, is one example of this. In Crow Tribe, to restate, the Ninth Circuit Court of Appeals has held that the State of Montana's 32.9% severance tax imposed upon non-Indian taxpayers on the Crow Reservation is preempted under federal law because it imposes high tax collections without commensurate services being provided to the reservation taxpayers. Moreover, since the Indian Mineral Leasing Act of 1938, pursuant to which the non-Indian taxpayers produce coal from reservation lands, requires that Indian benefits from their resources be maximized, the Ninth Circuit reasoned that the state's exorbitantly high tax imposed upon the non-Indian lessees cuts to the heart of the Tribe's ability to sustain itself and, therefore, is preempted as a matter of federal law.

In contrast to the litigation option, several other tribes have negotiated or are considering negotiating intergovernmental tax agreements with state and local governments. Pursuant to these agreements, the state and tribal governments cooperate in imposing taxes upon non-Indian taxpayers in Indian Country so as to achieve uniformity with respect to on- and off-reservation tax burdens. Under the agreements, the state and tribe agree to share the proceeds from such taxes based on some equitable formula. For example, several South Dakota tribes have entered into an agreement with the State. The agreements cover the collection of sales taxes and certain other taxes on the South Dakota Indian reservations. The effect of these agreements is to ensure that non-Indian taxpayers on the reservation are subject to no greater tax burdens than their off-reservation counterparts. In short, the combination of the tribal and state tax is equal to the state and local taxes imposed upon non-reservation taxpayers. Under these agreements, the proceeds from those collections are distributed to the state and the Indian tribes based on the ratio of the Indian to the non-Indian population on the reservation.

Similarly, in New York State, the Seneca Nation of Indians has been discussing with the State an intergovernmental tax agreement pursuant to which the State would agree to forebear on the imposition of its taxes, thus, leaving in place by tribal sanction the local county and city taxes imposed upon non-Indian taxpayers within the Seneca Reservation. The Nation's tax would substitute for the State taxes, thereby making uniform the total tax burdens of on- and off-reservation taxpayers.

As the Committee is aware, the patterns of land ownership, population ratios, and the size of the Indian Country land base vary greatly among tribes nationwide. In addition, the nature and scope of taxable activities throughout Indian Country is quite diverse. As Section II of this memorandum makes clear, irrespective of these differences, tribes have the main responsibility to deliver services to all taxpayers in Indian Country, especially since states often overlook taxpayers in Indian Country and federal services are declining drastically. State authority, however, at least with respect to non-Indians, is directly impacted by the foregoing characteristics. Because of the tremendous diversity in the character of Indian Country, uniform legislation governing the power of states or tribes to tax non-Indians in Indian Country would be exceedingly difficult to craft in a fair manner. Moreover, states and tribes increasingly are seeking ways to negotiate cooperation based on the unique facts of each tax issue. In light of the vast complexities in the character of each tribe's territory and the diversity among tribal territories, the more prudent course of action very well may be to permit the state and tribal dialogue to run its course.

In addition, any attempt to impose federal controls over tribal taxation decisions will supplant tribal with federal governance of the tribal territories. This result would fly in the face of current federal Indian policy favoring the strengthening of tribal governments and greater tribal self-determination. Tribes, moreover, currently have strong incentives to structure reasonable and sound tax programs. Like never before, tribes are promoting greater economic development in their territories due to declining federal programs. Confiscatory or arbitrary taxes would impede these efforts.

IV. CONCLUSION

As this memorandum has sought to make clear, the federal law governing the collection of taxes from both Indian and non-Indian taxpayers In Indian Country is quite clear in several respects. First, the tribes have broad jurisdiction to tax both Indians and non-Indians in Indian Country and second, states have no jurisdiction to tax Indians in Indian Country. State jurisdiction to tax non-

Indians in Indian Country is subject to reasonable limitations. Where the law governing the authority of state governments to impose taxes upon non-Indians is not clear or clearly is lacking, the options available to Indian tribes are to litigate and challenge the state taxes under federal law or begin discussing intergovernmental arrangements with the states to ensure non-Indian taxpayers are not uniquely burdened. At the present time, we can recommend no federal law amendments that would address fairly and effectively the widely divergent set of factual circumstances in the Indian Country tax arena. We recommend, instead, that the Committee encourage discussions between states and Indian tribes concerning the taxation of non-Indians in Indian Country. In this way, we believe appropriate and needed dialogue and working relationships between tribes and states can be built.

TAXATION WITHIN INDIAN LANDS: THE LEGAL FRAMEWORK

Introduction. This report will discuss the taxing authority of federal, state, and tribal governments over reservation Indians on Indian lands. It will provide a brief analysis of the body of law, statutory and decisional, that provides the framework for taxation issues within Indian reservations or trust lands.[1]

Background. The set of legal principles, statutes, and court decisions that comprises federal Indian law emphasize as fundamental principles federal supremacy and tribal governmental authority over tribal lands and tribal members. Because the courts have interpreted the Indian Commerce Clause[2] of the United States Constitution as conferring plenary power in Indian affairs to Congress, states' authority over Indians or Indian property or

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[1] This report will use the term "Indian reservation," to designate the territorial extent of Indian tribal jurisdiction. Under 18 U.S.C. 1151, the term used to designate criminal jurisdiction is "Indian country." It is possible that in some situations tribal jurisdiction is coextensive with Indian country. "Indian country" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
>
> 18 U.S.C. 1151.

[2] U.S.Const., Art. I, sec. 8, cl. 3, authorizes Congress "to regulate Commerce with foreign Nations, and among the several States, and the Indian tribes."

Indian reservations must derive from a grant of authority from the federal government. Because the federal power over the Indian tribes has been recognized by the courts as virtually plenary[3] and because the federal government has throughout its history engaged in government-to-government relations with the Indian tribes, the courts will presume that the tribes have authority over their land and their members unless divested of that authority by a federal statute or by the fact that the specific power they seek to exercise is found by the courts to be inconsistent with their status as dependent wards of the United States government.

Much of the difficulty of determining governmental authority on Indian reservations--including taxing authority--among the state, federal, tribal governments springs from lack of clear statutory guidelines. A great portion of the law in this area is federal court decisional law interpreting Congressional statutes and the federal Constitution.

The mode of analysis for any jurisdictional issue--including tax jurisdiction--from which the courts proceed in Indian contexts might be seen as fitting into the following framework: (1) If the federal government is asserting an authority, unless the Constitution forbids it, that authority is valid;[4] (2) If a state is asserting authority over reservations or reservation Indians, a federal statute or some form of federal acquiescence in the assertion of state authority must be found unless it can be shown that the state's assertion of jurisdiction does not interfere with reservation Indians;[5] (3) If a tribe is asserting authority over its members or its own land, that authority is presumed valid unless inconsistent with a federal statute or with the status of the tribe as an entity inferior to the overriding sovereignty of the United States;[6] and, (4) If a tribe is asserting authority over non-members, case by case adjudication will weigh the amount of consensual relation with the tribe and the effect upon essential tribal political, economic, or social interests.[7]

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[3] See Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[4] See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

To be sure, each case presents subtle novelties that can obscure the basic framework. Nonetheless, that framework is usually the starting place for any analysis of the various jurisdictional questions concerning Indian tribes and tribal lands.

Tribal Taxation. Since 1832, when the Supreme Court, in Worcester v. Georgia, 316 U.S. (6 Pet.) 515 (1832), held that the criminal laws of Georgia could not be used against a federal agent within the boundaries of the Cherokee Nation, the courts have interpreted the Congressional authority over commerce with the Indians, U.S. Const., art. I, sec. 8, cl. 3, as a delegation of exclusive authority in Indian affairs to the federal government, rather than to the state governments. Since that time the courts have upheld the authority of the tribes to govern their people and their land[8] except where there are conflicts with express federal law or where exercising such power would be inconsistent with tribal status as "domestic dependent nations."[9] This concept of tribal authority is often referred to as "tribal sovereignty."

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[5] See United States v.McBratney, 104 U.S. 631 (1881); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973); Montana v. United States, 450 U.S. 544 (1981).

[6] See Montana v. United States, 450 U.S. 544 (1981).

[7] See Williams v. Lee, 358 U.S. 217 (1959); Montana v. United States, 454 U.S. 544 (1981).

Incident to tribal sovereignty is the power to tax. That power, like all tribal powers, is limited by the relationship between the tribes and the federal government. A 1981 Supreme Court case, Montana v. United States, 450 U.S. 544, 565 (footnotes omitted), offered what seems to be the most current description of tribal sovereignty:

> . . . Indian tribes retain sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing, or other means nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

A 1934 Opinion of the Solicitor of the Department of the Interior, 55 I.D. 14 (October 25, 1934), I Opinions of the Solicitor, Department of the Interior, Indian Affairs 446, 465, described the tax powers of an Indian tribe as follows:

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[8] See Williams v. Lee, 358 U.S. 217 (1959) (tribal jurisdiction over contracts between Indian and non-Indian entered into on reservation); Fisher v. District Court, 424 U.S. 382 (1976) (per curiam) (adoption proceedings involving reservation Indians); United States v. Wheeler, 435 U.S. 313 (1978) (right of tribe to prosecute a member for a criminal offense even though federal government had already prosecuted him for the same offense; Merrion v. Jicarilla Apache Tribe, 462 U.S. 324 (1982) (authority of tribe to impose mineral severance tax on minerals extracted from its reservation); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (authority to regulate hunting and fishing within reservation; Kerr-McGee Corp v. Navajo Tribe, 471 U.S. 195 (1985).

[9] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, n. 43 (1831).

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Two early cases upheld the authority of Indian tribes, absent statutes or treaty provisions to the contrary, to impose a tax on owners--including non-Indians--of all cattle grazing within the tribal territory (Morris v. Hitchcock, 194 U.S. 384 (1904)), and to impose a tax on a nonmember living within the reservation (Maxey v. Wright, 3 Ind. T. 243, 54 S.W. 807, aff'd, 105 Fed. 1003 (1900)).

Although the case law upholding tribal taxing power dates to the early days of this century, tribes have only recently begun a concerted effort at economic development that has meant exercising their taxing authority to an unprecedented extent. The power that the tribes have over their members on their lands is relatively undisputed. Tribal members are, however, not the object of many of the tax raising ventures of Indian tribes. Non-members, individuals and businesses coming onto the reservations to do business with Indians or owning property or property interests within the external boundaries of the reservations, are generally the targets of tribal taxes. Tribal authority over them is not clear-cut and is often decided on a case by case basis.

Today, the same principles apply to questions of tribal taxing authority. Resolution of specific questions as to the authority of a tribe to impose a particular tax often depends on a complex analysis of applicable federal statutes and treaties, type of tax, and where the legal incidence of tax falls.[10] Generally, tribal power to tax does not spring from federal law but from tribal sovereignty. Tribes do not need federal authorization to impose a tax. Courts that face cases involving challenges to tribal taxes first must decide whether any federal law has revoked the tribe's authority to impose the tax in question or whether the exercise of that authority of the tribe is incompatible with tribal status as subordinate to the federal government.

The recent cases testing tribal tax authority address these two questions. In Washington v. Confederated Colville Tribes, 447 U.S. 135, 152 (1980), the Supreme Court upheld the authority of tribes to impose taxes on reservation cigarette sales to members and non-members, saying:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implications of their dependent status.

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140, 144 (1982), the Court upheld the authority of tribes to impose severance taxes on minerals withdrawn from tribal land and did so on the broad ground of tribal sovereignty:

> . . . the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who

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[10] The term, "legal incidence," with reference to a tax, is used to distinguish it from the economic impact of the tax. It is often used in cases involving whether a state tax may be applied to an entity connected with the federal government. If the legal incidence of the tax, in contrast with the economic impact, is held to fall upon the federal government, the state tax is invalid. In United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975), for example, the Court held that where the state law required a tax to be passed on to the ultimate purchaser, the legal incidence fell on that purchaser and where the purchaser was the United States, the state tax was no applicable. Some of the Indian tax cases have struck down state taxes although their legal incidence fell on non-Indian persons dealing with tribes. See White Mountain Apache v. Bracker, 448 U.S. 136 (1980).

> benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits no other conclusion.
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> . . . based on the views of each of the federal branches, general principles of taxation, and the conception of Indian tribes as domestic, dependent nations, we conclude that the Tribe has the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and pay for the cost of self-government.

The Court found, moreover, that federal statutes granting states the right to impose severance taxes on minerals extracted from tribal land did not impliedly divest tribes of the authority to tax such minerals. The decision can, thus, be read as indicating that Congressional statutes divesting Indian tribes of inherent taxing authority must be clear on the point; ambiguities will be resolved in favor of the tribes.[11]

There is one other recent Supreme Court tribal tax case, Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985). It dealt with the formalities of the promulgation of tribal tax ordinances rather than the power to do so. The issue was whether a tribe that did not have a constitution and, thus, had no tribal requirement to submit tribal ordinances to the Department of the Interior for approval before promulgation could impose a possessory interest tax and a business activity tax on mineral production within its reservation. The Court found no federal statute or regulation that required such approval. It, therefore, upheld the tax. In doing so, it made a statement as to the relationship between tribal taxing authority and the current federal policy toward Indian tribes:

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[11] The Court said, "[w]e find no 'clear indications' that Congress has implicitly deprived the Tribe of its power to impose the severance tax. In any event, if there were ambiguity on this point, the doubt would benefit the Tribe, for '[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with federal policy encouraging tribal independence.'" Merrion v. Jicarilla Apache Tribe, 455 U.S. 152 (1982) (citation omitted).

> . . . the Federal Government is 'firmly committed to the goal of promoting tribal self-government.' . . . The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.
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> Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200-201 (citations omitted).

Federal Taxing Authority. Because of the provision in the United States Constitution referring to "Indians not taxed,"[12] a phrase that referred to the original method of computing representation in the House of Representatives, there is a persistent erroneous notion that Indians are not subject to federal taxation.[13] Individual Indians, however, are generally subject to federal taxes; Indian tribes are generally exempt.

In Squire v. Capoeman, 351 U.S. 1, 6 (1956), the Supreme Court stated the general proposition that "Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." That proposition could easily and accurately be extended to all federal taxes. The complication is that treaties and remedial legislation abound and federal taxation of Indian property is a complicated matter. One commentator writes:

> Congress has broad authority to tax all persons and entities throughout the United States. Congress also has broad power to legislate respecting Indians. The fifth

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[12] U.S.Const. art. I, sec. 2; Amend. XIV, sec. 2. See I Opinions of the Solicitor, Department of the Interior, Indian Affairs 990 (Nov. 7, 1941) for a discussion of the original purpose of this phrase and a judgment of its inapplicability today.

[13] See Cohen, F., Handbook of Federal Indian Law 254 (1942), 388-389 (1982).

> amendment is a limitation on the taxing power in certain instances, but federal power to tax Indians and tribes is usually clear. Federal laws taxing all persons apply to individual Indians in most circumstances. But Indian tribes are not subject to the federal income tax as a matter of general policy. Also, federal tax laws are assumed not to intend to infringe on the rights of Indians under treaties and Indian legislation, absent clear congressional intent to the contrary. In short, the application of federal tax laws to Indians and tribes is usually a matter of interpreting the purposes of applicable treaties, Indian laws, and tax laws.[14]

Under the Internal Revenue Code, Indian tribes are not considered taxable entities.[15] Under the Indian Tribal Government Tax Status Act of 1982,[16] Indian tribal governments and their subdivisions are treated as states for the purpose of certain excise taxes and for other transactions.[17]

Individual Indians are generally subject to all federal income, estate and gift, and excise taxes. Excepted are payments to them from the federal government to discharge claims judgments.[18]

Also exempt from federal income taxation is income from land held in trust by the United States. This includes tribal trust land and Indian allotments. The leading case on this issue is Squire v. Capoeman, supra. It held that imposition of a capital gains tax on the receipts from the sale of timber on an Indian allotment held in trust by the United States was invalid because of a provision in the General Allotment Act of 1887,[19] requiring the Secretary of the Interior, upon satisfaction of certain conditions, to turn the allotted land over to the allottee in fee absolute, free of all restrictions against alienation. It read that provision as evincing a Congressional intent that the allotments be free of taxation during the trust period. It refused to read subsequently-passed income tax law as altering the tax exemption.

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[14] Cohen, F., Handbook of Federal Indian Law 390-391 (1982).

[15] Rev. Rul. 67-284, 19-2, C.B. 55, 58.

[16] Pub. L. 97-473, sec. 202, 96 Stat. 2605, 2608, as amended by Pub. L. 98-21, Tit. I, sec. 122(c)(6), 97 Stat. 87, 26 U.S.C. 7871.

[17] For example, for federal income tax purposes, interest on certain obligations of tribal governments is excluded from income, taxes paid to tribal governments are deductible, and charitable contributions to tribes are deductible.

[18] 25 U.S.C. 1407.

Cases have held that income derived by individuals from tribal land is subject to federal income tax[20] and that income from individual trust funds held by the United States may be taxable.[21] The Internal Revenue Service has ruled that income that is directly derived from allotted land that is still in trust status, including rentals, grazing fees, and crop sales, is not taxable.[22]

State Taxing Authority: Taxation of Tribes. Generally, Indian tribes are sovereign entities and are immune from process in state courts. Tribes are, thus, not subject to state taxes. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985), ruled that the State of Montana could not tax the royalty interest on Blackfoot Tribe mineral leases on unallotted lands within the reservation in such a way as to extend broad immunity from state taxation toward tribal ventures on the reservation.

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[19] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331 et seq.

[20] Holt v. Commissioner, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967); Stevens v. Commissioner, 51 T.C. 330 (1969), aff'd in part and rev'd in part on other grounds, 452 F.2d 741 (9th Cir. 1971).

[21] Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935), permitted taxation of trust funds held for an individual member of the Creek Tribe. The federal tax law in existence at the time was seen as requiring taxation of "all income from whatever source," and no special Creek statute or treaty was found to require exemption. The implication, therefore, was that there may be statutes or treaties that can be applied to particular cases to result in invalidating a state tax.

[22] Rev. Rul. 56-342, 1956-2 C.B. 20.

The contention of the state was that such taxes were authorized by a 1924 statute.[23] Using principles of statutory construction particular to federal Indian law--that "States may tax Indians only when Congress has manifested clearly its consent to such taxes . . . [and] statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," 471 U.S. at 766--, the Court held that leases made pursuant to the 1924 Act were taxable, but that those made pursuant to a subsequently enacted statute that did not explicitly repeal the 1924 act were not taxable. In reaching this decision the Court employed broad language regarding the authority of states to tax Indian activity on reservations:

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765.

State Taxing Authority: Taxation of Tribal Off-Reservation Activity. Any immunity Indians or Indian tribes have from state taxation derives from federal reservation of Indian lands to insulate them from state jurisdiction by preempting the reach of state law over the reservation. In contrast, off-reservation activity by Indians or Indian tribes is fully taxable by states under laws that are generally applicable to lands and people within the jurisdiction of the states.

The leading case is Mescalero-Apache Tribe v. Jones, 411 U.S. 145 (1973). It involved an attempt by the State of New Mexico to impose a gross receipts tax on a ski resort operated by the Mescalero Apache Tribe on off-reservation leased land. The state also sought to collect use taxes on materials used to construct ski lifts. Federal land and loans had been used to develop the ski resort. The Court analyzed the case by proceeding from the following premise: "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally be held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149. In examining relevant statutes, the Court found none that explicitly exempted income earned off-reservation from state taxes. It did, however, find that 25 U.S.C. 465, a part of the 1934 Wheeler-Howard or Indian Reorganization Act, did contain an exemption from state taxation for Indian property acquired under that act and taken into trust by the United States. Since the ski lifts were permanently affixed to the land, they were held to be real property and, thus, not taxable by the state.

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[23] Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398.

State Taxing Authority: On-Reservation Activities Involving Non-Indians or Non-tribal Members. The themes of federal preemption and tribal sovereignty, self-government, or separateness abound in the recent cases involving questions of state taxing authority over reservations or Indians. The first of these, Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965), held that a state could not impose a tax on the gross receipts of a retail trading concern doing business on the Navajo Reservation. The theory was that the tax was preempted by the comprehensive scheme of federal statutory and administrative regulation of Indian traders.

The Court noted that for over one hundred years the United States government had permitted the Navajos, within their own reservation, to be free of state control, simultaneously relieving the state of the responsibility of providing governmental services to the reservation area. According to the Court,

> [t]his state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.
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> Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685, 691 (footnote omitted).

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1972), illustrates many of the principles followed in subsequent cases, including the basic one: state taxability of on-reservation activity depends upon whether there has been federal preemption. McClanahan involved the efforts of the State of Arizona to levy income taxes on reservation Indians whose sole source of income was within the reservation. In analyzing the question, the Court cautioned that Indian sovereignty was not to be the governing concern: " . . . the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (citations and footnotes omitted). The Court reasoned:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and

> that their claim to sovereignty long predates that of our own Government.

The Court then proceeded to examine the relevant treaty with the Navajo tribe and certain other federal statutes, including the Buck Act, 4 U.S.C. 105, et seq., which addresses state taxation of persons living within federal enclaves but has an exclusion for certain Indians, and found that there was no federal authorization of such state taxation of Indian income derived from on-reservation activity.

In Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 464 (1976), the Supreme Court dealt with the attempt by the State of Montana to tax on-reservation sales of cigarettes and personal property of reservation Indians as well as with the authority of tribes to impose sales taxes on cigarettes sold on the reservation. Relying on McClanahan, and with language indicating that the decision was reached at least partially because of a finding that the legal incidence of the tax fell on the retail purchaser, the Court found that the personal property tax and the cigarette sales tax, as applied to Indians residing on the reservation, to be invalid. It also upheld the authority of the state to impose sales taxes on cigarettes sold to non-Indians on the reservation and to require Indian tribal sellers to collect those taxes. It found the requirement that Indian traders collect state taxes to be a burden so small that frustration of tribal self-government or federal statute was inconceivable.

Bryan v. Itasca County, 426 U.S. 373 (1976), involved the question of whether a state could impose a personal property tax on the mobile home of an Indian living on a reservation that fell within the jurisdiction of Public Law

280,[24] 28 U.S.C. 1360a. This statute grants certain states "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise . . . to the same extent that such State . . . has jurisdiction over civil causes of action" and declared that "those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 25 U.S.C. 1360a. The statute also contains a disclaimer that it confers no power to tax Indian property unless consistent with applicable federal statutes or treaties.

Since the legislative history of Public Law 280, except for one remark in Committee hearings, contained no mention of transferring taxing authority to the states, concentrating instead on the problem of maintaining law and order on the reservations, the Court held that taxing jurisdiction was not conferred by Public Law 280. It read the grant of civil jurisdiction narrowly, to confer upon the courts of the states affected the authority to hear civil cases involving Indians.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 133 (1980), involved an attempt by the State of Washington to impose sales taxes on reservation sales of cigarettes to non-tribal members and excise taxes on the use of motor vehicles within the state. Each of the tribes concerned in the litigation had provisions for tribal taxation of on-reservation cigarette sales. The facts showed that the actual cost of cigarettes to the retail purchaser was one dollar less with tribal tax alone than it was with state tax alone. The majority of purchasers of cigarettes on the reservations were not members of the tribes. The tribes contended that imposition of the tribal tax on sales to non-members operated to divest the state of its authority to tax such sales. While recognizing that the tribes had authority to impose taxes on sales to non-members and noting that the imposition of the state tax in addition to tribal taxes would destroy any competitive edge the tribes had in selling cigarettes, the Court refused to find the state tax as invalid or preempted by federal statute, contrary to tribal self-government, or invalid under the Indian commerce clause.

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[24] Act of Aug. 15, 1953, ch. 505, 67 Stat. 984, as amended 25 U.S.C. 461-479.

In reaching the conclusion that the state tax on sales to non-members was valid despite corresponding tribal taxes, the Court took notice of the fact that the product being sold was not a reservation product, indicating perhaps that a different result might ensue were reservation generated items being taxed. One conclusion that the Court reached was "[w]e do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155.

One of the arguments presented by the tribes involved an assertion that state taxation would frustrate federal policy fostering tribal self-government. In rejecting this argument, the Court suggested a framework for evaluating the relative position of tribal versus state interests:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. . . . While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the

> reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.
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> Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 133, 156-157.

The Court also held invalid the state's excise taxes on motor vehicles, but suggested that if the tax were assessed in terms of actual use of state roads, such a tax might be validly applied to reservation Indian owned vehicles.

Two decisions of the Court in 1980 indicated that where there is a comprehensive federal statutory or regulatory scheme, a state tax may not be valid as imposed upon a non-member or a non-Indian doing business within the reservation or with the Tribe even if the federal statutory scheme does not specifically apply to the situation or address the particular tax issue. In Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160 (1980), the issue was the validity of state taxes on equipment sold by non-Indians to an Indian business within a reservation. Although the business selling the equipment was not licensed as an Indian trader by the Bureau of Indian Affairs, the existence of the Indian trading statutes was held by the Court to be a barrier to state taxation of such sales to Indians on their reservation.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), involved a state attempt to impose on a concern harvesting timber on a reservation under contract to the tribal corporation a motor carrier license fee in terms of a percentage of gross receipts and a fuel use tax. The company had no other contacts with the state. The facts showed that it was being reimbursed by the tribe for the state taxes it had paid.

The Court saw this as a question involving state assertion of authority over non-Indians within a reservation and identified the method of analyzing such situations as requiring "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145. Because of the pervasive federal regulation of tribal timber operations, the Court concluded that state taxation would disturb the federal scheme, particularly in altering the calculated returns for tribes on their timber operations. The tax was, therefore, invalid. The Court also remarked on the virtual absence of state-supplied services to the timber operation and the failure of the state to identify its regulatory interest in imposing such taxes on Indian timber harvesting operations. The Court also indicated that the fact that the economic burden of the tax fell on the tribes was relevant to its holding even though the legal incidence of the tax fell upon the contractor.[25]

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[25] The dissent in the case took issue with this:

> Under these circumstances I find the Court's reliance on the indirect financial burden imposed on the Indian Tribe by state taxation of its contractors disturbing. As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax. . . . In Warren Trading Post the Court found an exception to this rule where Congress had chosen to regulate the relationship between an Indian tribe and a non-Indian trader to such an extent that there was no room for the additional burden of state taxation. In this case, since the state tax is unlikely to have a serious adverse impact on the tribal business, I would not infer the same congressional intent to confer a tax immunity. Although this may be an appropriate way in which to subsidize Indian industry and encourage Indian self-government, I would require more explicit evidence of congressional intent than that relied on by the Court today.

White Mountain Apache v. Bracker, 448 U.S. 136, 159 (Stevens, J., dissenting).

In the 1982 decision, Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, the Court was faced with the question of whether a state could impose gross receipts taxes on a firm contracting with a tribal school board to construct a school on the reservation. Finding the existence of federal grants for building schools, a federal regulatory process for approving those grants, and long-standing federal involvement in Indian education as indicative of a pervasive scheme of federal regulation, the Court held the state tax to be preempted, notwithstanding the fact that the legal incidence of the tax fell upon the non-Indian contractor.

The opinion of the Court found the case to be completely consonant with White Mountain Apache v. Bracker. The Court applied the standard used in that case and concluded that although there were differences, e.g., the construction company in this case was licensed to do business in the state, the analysis of the relevant federal, state, and tribal interests revealed that state taxation had been preempted. The analytical framework relied upon derived from White Mountain Apache:

> . . . federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause . . . and from the semi-autonomous status of Indian tribes. . . . These interests tend to erect two 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions . . . .
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> Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 837 (citations omitted).

In this case the Court refused to decide the case, as requested by the Department of Justice in an amicus curiae brief in behalf of the United States, on the basis of the Indian Commerce Clause, i.e., by holding that there was presumptively a lack of state taxing authority over on-reservation activity involving an Indian tribe.

California State Board of Equalization v. Chemehuevi Indian Tribe, ___ U.S. ___, 106 S.C. 289 (1985), is a summary disposition of a challenge to the imposition of a California cigarette tax on the distribution of cigarettes on an Indian reservation to non-Indians. The Court held that such a tax could be imposed validly and that the state could require the tribe to collect the taxes. To hold the tax invalid the lower courts had relied on the absence of explicit language in the state statute to make it clear that the tax was to be passed through to the consumer. The Supreme Court did not find such explicit language controlling even though the earlier cigarette taxing cases involved state statutes containing such language. The Court, thus, held that the ultimate incidence of the tax fell upon the consumer; non-Indian customers of Indian smoke shops could be required to pay the tax. It also found the burden of collecting the tax to be minimal. Indian smokeshop operators, therefore, could be required to collect it.

Summary of State Taxing Authority Within Reservations. The principles that the courts apply in deciding whether states have taxing authority over a particular situation on a reservation are seemingly undergoing a crystallization process. Two concepts are controlling: federal preemption and tribal sovereignty. When the question involves a state tax of tribal activity on the reservation, the Supreme Court looks for a specific grant of authority to the state to impose such a tax.[26] When the tax involves non-Indians or non-tribal members within the reservation, the ordinary rules of state jurisdiction, including taxing jurisdiction, apply.[27] When the tax is imposed on those doing business with a tribe or in some type of contractual or consensual relationship with the tribe, that the legal incidence or the economic burden of the tax falls upon the tribe may be controlling, for the ultimate question to be resolved is whether federal law has preempted the state tax. Any preemption analysis starts with federal statutes and treaties and takes into account tribal sovereignty.[28]

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[26] See Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

The commentators[29] have made attempts with varying degrees of elaborateness to rationalize or schematize the Indian tax cases. It is possible that no such attempt is wholly satisfactory. That view seems to have been the impetus for the Solicitor General to petition the Court in Ramah Navajo School Board, Inc. to consider adopting an Indian Commerce Clause preemption rationale in deciding cases involving attempts by states to tax non-Indian or non-tribal businesses involved with tribal activities. In the amicus curiae brief filed by the Solicitor General in that case, the following statement summing up the difficulty of reconciling all the threads in the Indian tax case precedents appears:

> For some years, the Court has eschewed 'treacherous

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[27] Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) (non-Indian livestock grazing on Indian land); Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980) (cigarette sales to non-tribal members).

[28] See Warren Trading Post co. v. Arizona Tax Commission, 380 U.S. 685 (1965); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); and, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[29] See Cohen, G., Handbook of Federal Indian Law, 413-415 (1982); Annotation, "Validity, Under Federal Constitution, Statutes, and Treaties, of State or Local Tax as Affected by its Imposition on Indians, Their Property or Activities, or in Connection with an Indian Reservation--Supreme Court Cases," 73 L.Ed. 2d 1506 (1984); Note, "Balancing the Interests in Taxation of Non-Indian Activities on indian Lands, 64 Iowa l. Rev. 1459 (1979); and, Wilkinson, C.F., American Indians, Time, and the Law 96-99 (1987).

> generalizations,' including any constitutional ruling, in Indian cases, deciding each of them on a 'particularized inquiry' of competing governmental interests and examining regulations for preemptive intent. But the upshot is that State courts and lower federal courts are apparently at sea in their attempt to apply this Court's recent precedents to a variety of contexts. In consequence, controversy abounds and all courts--including this Court--are burdened with more litigation in this area than is necessary or salutary. Moreover, the prevailing uncertainty embarrasses the conduct of all three governments involved, tribal, state and federal, creates needless friction, and is likely to deter future on-Reservation investment and commercial arrangements. In this situation, we join the affected States in urging the Court to declare more broadly the controlling principles.
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> Brief for the United States as Amicus Curiae, at 1-2, Ramah Navajo School Board, Inc., 458 U.S. 832 (1982).

Conclusion. While overgeneralization can be particularly hazardous in any issue involving federal Indian law, it is to be avoided most assiduously in the tax area. There are, however, some general statements that may be offered. The federal government may, and generally has, applied general taxes to individual Indians. It has treated tribes as states for some tax purposes and has exempted trust lands and income from federal taxes.

Tribes may tax Indians within their reservations and may impose certain taxes on non-Indians within the reservations, particularly where those taxed are involved in consensual relationships with the tribes or essential tribal functions necessitate such taxes.

States may generally not tax tribal Indians on reservation lands for reservation activities without a grant of authority from the federal government. States may, however, tax non-Indians within a reservation who are not involved with tribal activities to the extent that other citizens of the state are taxed. When a state seeks to tax non-Indians who deal with the Indians within a reservation, the Supreme Court has indicated that a preemption analysis is in order. That analysis involves a case by case evaluation of relevant federal statutes, treaties, and executive branch actions as well as a balancing of state interests. All of this is to be judged against a background of tribal sovereignty.

M. Maureen Murphy
Legislative Attorney
American Law Division
July 10, 1987

TESTIMONY OF THE CITY OF RIVERTON, WYOMING BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS REGARDING S.1039 - A BILL TO REVIEW AND DETERMINE THE IMPACT OF TRIBAL TAXATION ON INDIAN RESERVATIONS AND RESIDENTS

The City of Riverton is located in west central Wyoming, in Fremont County, and within the exterior boundaries of the Wind River Indian Reservation as it was established by the Treaty of 1868. In the early 1900's the United States Government, through various acts of Congress, ceded much of the land north of the Wind River from the Reservation. Today more than 400,000 acres of the land north of the Wind River in Fremont County, Wyoming is owned by non-Indians. (See the area bordered in blue on the map attached hereto as Exhibit "A"). Included in these non-Indian owned lands is the City of Riverton and its environs with a non-Indian population of approximately 15,000. The other lands ceded from the Reservation and located north of the Wind River consist mainly of agricultural lands immediately surrounding the City of Riverton and the Riverton Reclamation Project which is now the Riverton Unit of the Pick Sloan Missouri Basin Program consisting of approximately 300,000 acres of land.

The City of Riverton supports the enactment of S.1039. This legislation, co-sponsored by Senator Alan Simpson of Wyoming, provides, among other things, a two year moratorium on the approval of any tribal tax ordinances by the Secretary of Interior. The City believes that this period of time is necessary to assess the effects and consequences of the Tribal tax programs. Important questions need to be considered before the historical taxing structure in Fremont County, Wyoming is substantially altered. The recent initiatives of the Shoshone and Arapahoe Tribes in enacting totally new and far-reaching tax programs will certainly have a serious impact on Indians and non-Indians alike. Some of the concerns to be addressed include, but are not limited to, the following:

1. What effect will the imposition of tribal taxes have on non-tribal persons residing on the reservation?
2. What governmental services do the Indian Tribes intend to provide for the Indian and non-Indian residents on the Reservation in exchange for the collection of tax revenues?
3. Will non-Indian residents of the Reservation have a vote on the type of taxes to be imposed and an opportunity to be heard with respect to the programs and services to be supported by these tax revenues?
4. Do the Indian Tribes intend to exert taxing authority on those lands ceded from the Reservation as it was established in 1868, including the City of Riverton, or do the Indian Tribes intend to limit their taxing authority to the diminished portion of the Reservation as it exists today?

The above are but a few questions that need to be answered by open and complete discussions with all parties concerned including the Indian Tribes, State of Wyoming, County of Fremont and the City of Riverton.

The City of Riverton received no notice of the hearing of this committee held in November, 1987. The first notice we received of the hearing was a newspaper article relating to the testimony given by Wesley Martel, Co-chairman of the Shoshone Business Council, to this Committee on November 12, 1987. This newspaper article appeared in the Riverton Ranger on November 23, 1987. The City subsequently obtained a copy of Mr. Martel's printed testimony. One of the principal purposes of this late filed statement is to correct the record with respect to some of the statements made by Mr. Martel as they relate to the City of Riverton.

On Page 3 of Mr. Martel's statement he states that the City of Riverton is "located entirely within the Reservation". We take exception to this statement. The City of Riverton was ceded from the Reservation nearly a century ago. It is not included within the diminished portion of the Reservation and it is not "Indian country".

Recently the City of Riverton annexed a contiguous area of non-Indian owned land, heretofore under the exclusive jurisdiction of the Fremont County government, north of the Wind River commonly called the South Federal Boulevard area. Mr. Martel stated in his testimony to the subcommittee, at page 3, that the non-Indian people in the area to be annexed "unanimously opposed the annexation, preferring instead to continue their exclusive relationship with the Wind River Tribes". The fact of the matter is that many of the property owners and residents of the area to be annexed supported the annexation or were not opposed thereto. The objection to the annexation was the fear of increased burden of taxes to the businesses and property owners and a desire to continue their exclusive relationship with the Fremont County government.

Furthermore, Mr. Martel's last statement would suggest that there was a "exclusive relationship" with the people in the annexed area with the Wind River Tribes. This is not correct. The Shoshone and Arapahoe Tribal Government had no relationship whatsoever with the annexed area or the non-Indian people residing therein. The City of Riverton has provided governmental services to this particular area for many years. These services include water, sewer, zoning, subdivision regulation, police protection, fire protection, street maintenance and repair and snow removal. In addition, this area benefits from the fire insurance ratings of the City. Prior to annexation, Fremont County issued two liquor licenses, issued two pawn shop licenses and otherwise regulated businesses in the annexed area. Fremont County has also provided street repair, road maintenance, snow removal, police protection and other governmental services. The Tribes have never provided governmental services in the annexed area.

On pages 3 and 4 of Mr. Martel's statement to the Committee he suggested that "the Wind River Tribes, ... provide essential governmental services both to Indian and non-Indian tax payers on their Reservation." In actuality, the Wind River Tribes provide no governmental services to non-Indians residing on lands that have been ceded from the Reservation and that are located north of the Wind River.

In summary, the City of Riverton supports the enactment of S.1039. An appropriate period of time is essential for consideration of the Tribal taxing initiatives since the imposition of tribal taxes will have a substantial and material effect on Indian and non-Indian people living on or near the Wind River Indian Reservation. Time is needed to consider the need and efficacy of Tribal taxation and the benefits of having essential governmental services performed by the Tribes rather than the governmental entities now providing those services.

CITY OF RIVERTON, WYOMING

Albert T. Brown
Albert T. Brown, Mayor

Sue Ambler
Sue Ambler, Councilperson

City of Riverton Testimony on S.1039
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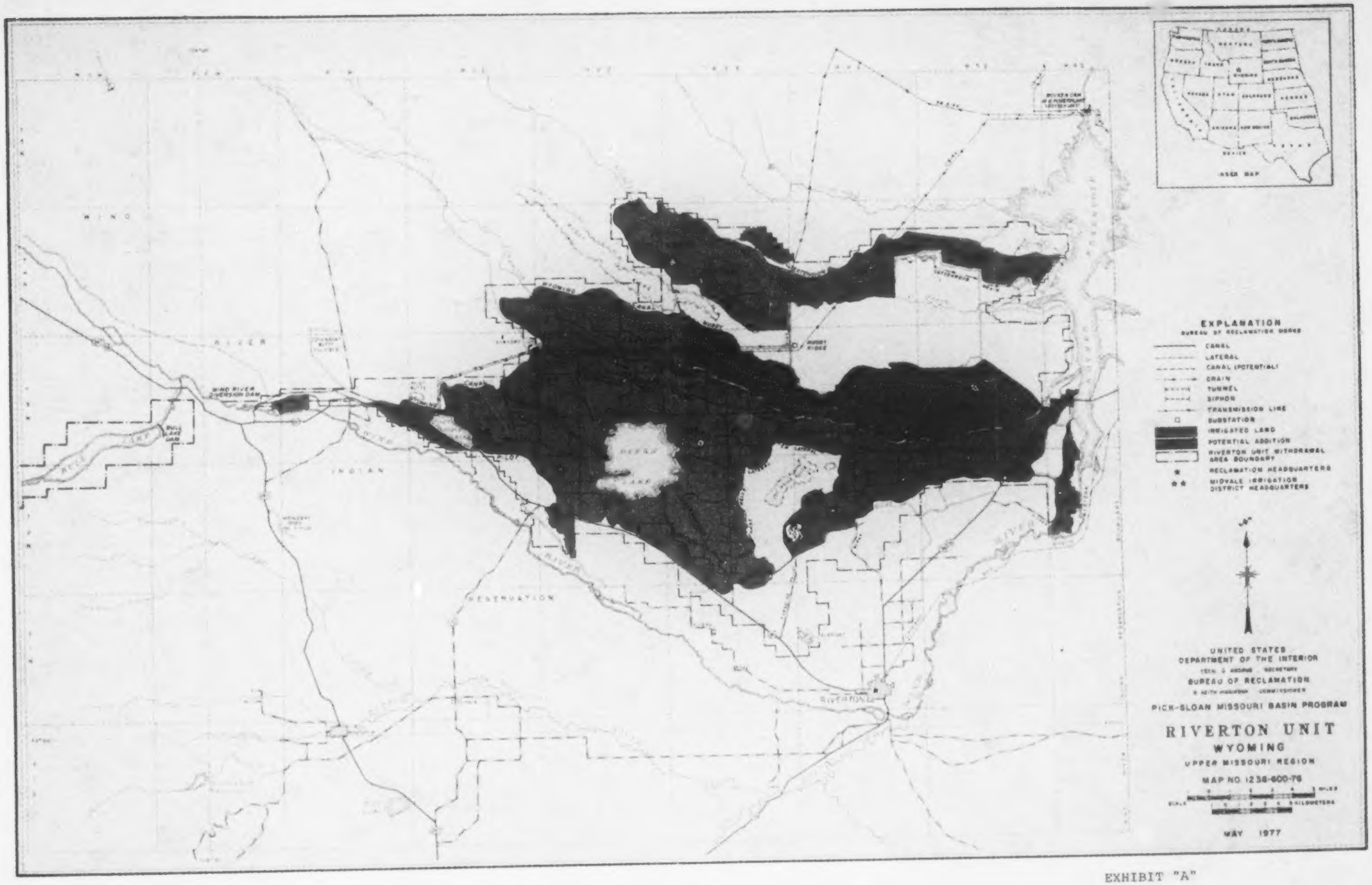
Mary Longtine
Mary Longtine, Councilperson

Margaret M. Rogers
Margaret Rogers, Councilperson

Jim Thurston
Jim Thurston, Councilperson

William F. Porter
William F. Porter, Councilperson


INDEX MAP
EXPLANATION
BUREAU OF RECLAMATION WORKS
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LATERAL
CANAL (POTENTIAL)
DRAIN
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TRANSMISSION LINE
SUBSTATION
IRRIGATED LAND
POTENTIAL ADDITION
RIVERTON UNIT WITHDRAWAL AREA BOUNDARY
RECLAMATION HEADQUARTERS
MIDVALE IRRIGATION DISTRICT HEADQUARTERS
UNITED STATES
DEPARTMENT OF THE INTERIOR
CECIL D. ANDRUS SECRETARY
BUREAU OF RECLAMATION
R. KEITH HIGGINSON COMMISSIONER
PICK-SLOAN MISSOURI BASIN PROGRAM
RIVERTON UNIT
WYOMING
UPPER MISSOURI REGION
MAP NO 1238-600-76
SCALE
MILES
KILOMETERS
MAY 1977
WIND
RIVER
WIND RIVER DIVERSION DAM
BULL LAKE DAM
INDIAN
RESERVATION
WYOMING CANAL
MUDDY RIDGE
RIVERTON

EXHIBIT "A"

FACTUAL DATA ON THE RIVERTON UNIT

WATER SUPPLY

Riverton Unit receives its water supply from the Wind River and its tributaries above the Wind River Diversion Dam. Bull Lake Creek is a principal tributary of the Wind River. Headwaters of the Wind River rise on the northeastern slope of the Wind River range and on the southern slope of the Absaroka range. Wind River above the diversion dam has a drainage area of approximately 2,000 square miles. The estimated average annual runoff at the diversion dam is 906,000 acre-feet. The water is of excellent quality for irrigation use.

PROJECT FEATURES

Bull Lake Dam is located on Bull Lake Creek 2½ miles above the junction of the creek with the Wind River. The dam is of rolled earth, riprap, and rockfill construction. It has a crest length of 3,456 feet and a maximum height above foundation of 81 feet. Bull Lake Reservoir has a storage capacity of 152,000 acre-feet and a surface area of 3,196 acres.

Wind River Diversion Dam is the point of diversion for all water used on the project. It is located on the Wind River 4 miles below the junction of Bull Lake Creek and the Wind River. The dam is a concrete gravity structure with an ogee spillway section 651 feet in length, a sluiceway 61.5 feet long, and a headwork 73 feet in length. A rolled earth embankment, 1,656 feet in length adjacent to the southwesterly end of the concrete section, completes the dam. Maximum height of the dam above foundation is 37 feet. Capacity of the diversion works is 2,200 cubic feet per second.

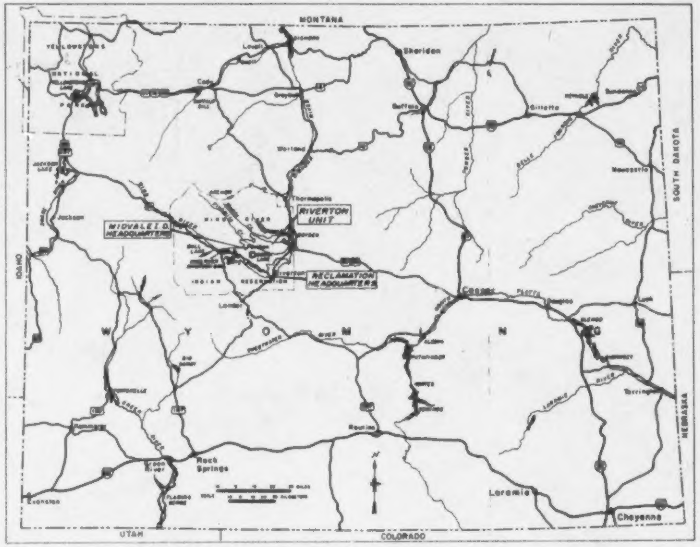
Wyoming Canal is the principal carriage works for the unit. Water is diverted into the canal at Wind River Diversion Dam. Water is conveyed through the canal to Pilot Butte Reservoir and to the distribution facilities of the project. Wyoming Canal, First Division, extends from the diversion dam to the diversion point to Pilot Butte Reservoir. Wyoming Canal, Second Division, extends from this point for a distance of 7 miles. Wyoming Canal, Third Division, which includes Cottonwood Bench, extends 46 miles north and east of the Second Division. The three divisions, as constructed, supply water to about 70,000 acres within the Midvale Irrigation District.

Pilot Butte Dam is composed of three earth and rockfill embankments with a combined crest length of 5,900 feet. Structural height of the main embankment is 51 feet.

Pilot Butte Reservoir provides offstream storage below the Wyoming Canal, First Division. Active capacity of the reservoir is 31,600 acre-feet and the surface area is 900 acres. Water is diverted from the Wyoming Canal through a chute structure to the reservoir where it is re-regulated and discharged into Pilot Canal.

Pilot Canal is 38 miles in length and traverses the south side of the project. Initial capacity of the canal is 1,000 cubic feet per second.

North Portal and North Pavillion area of the Third Division, which was homesteaded during 1949 and 1950, consisted of 82 farm units. Settlers in this area became dissatisfied and the Bureau could not negotiate a repayment contract with them. Congressional action directed the Bureau to buy back all lands within this area. The Bureau purchased 78 units totaling about 22,000 acres. The land was leased to Midvale project farmers for a period of 6 years.



During this period, the land proved to be suitable for irrigated farming. In 1970, under Public Law 91-409, the Project was reauthorized as the Riverton Unit of the Pick-Sloan Missouri Basin Program. At that time the units were realigned and combined into 43 units, and sold at public auction to farmers of the Midvale Irrigation District. This land was petitioned into the Midvale Irrigation District. The land on Cottonwood Bench was withdrawn from homesteading and several plots, which proved to be successful, were leased to project farmers for several years on an experimental basis to determine if the land was suitable for sustained irrigation. This land was sold to project farmers in March 1974 and petitioned into the Midvale Irrigation District.

Included in Public Law 91-409 was authorization for a major rehabilitation program on the older part of the unit (First and Second Divisions). Funds became available to initiate construction in 1971 and will be completed about 1981. This rehabilitation includes rebuilding chutes, drops, canal and lateral lining; constructing approximately 300 miles of tile drains; and modifying the diversion dam for silt control and automation.

IRRIGATION

Irrigation facilities, as constructed, provide for irrigation of approximately 70,000 acres on the Riverton Unit. Regulation of the Wind River, source of water supply for the unit, is necessary and is provided by a storage reservoir on Bull Lake Creek, a tributary to Wind River. The stored water is released as needed for irrigation of unit land. Bureau of Reclamation canals for delivering water to unit land have a combined length of 100 miles. Distribution is accomplished by approximately 300 miles of laterals. In fiscal year 1977, the Bureau of Reclamation began a feasibility study of Muddy Ridge for possible development of about 18,000 acres of additional land for irrigation.

RECREATION

The Wyoming Game and Fish Commission, under contract with the Bureau of Reclamation, administers about 28,000 acres along Muddy and Five Mile Creeks, Ocean Lake area, Cottonwood Drain area including three reservoirs on Cottonwood Bench, and the east portion of Cottonwood Bench. Ocean Lake was created by project drainage water and irrigation system wastes. Surface area of the lake is 6,208 acres. It is a major recreation area and is managed by Wyoming Game and Fish Commission.

CLIMATOLOGICAL DATA

The soil varies over the project from sandy loam to heavy clay. The variation occurs at different locations within the unit area. The elevation of irrigated lands within the unit ranges from 4,700 feet to 5,400 feet.

The average annual precipitation in the unit area is 9.39 inches. The average annual temperature is 44.5° F. Temperatures range from -42° F to a high of 101° F. The summer months have a high percentage of cloud-free days which promote rapid plant growth.

PRINCIPAL PRODUCTS

The principal crops are alfalfa, irrigated pasture, malt barley, feed barley, oats, corn and beans. In addition, dairying is practiced; farm flocks of sheep are raised, and feeder lambs and cattle are fed out by utilizing stubble pasture and hay and grains produced on the farms.

PRINCIPAL MARKETS

Agricultural products from the unit are distributed throughout the Nation. Riverton, Wyoming, is the local market center for crops and livestock. Principal out-of-state markets are located at Omaha and Sioux City, Nebraska; Boston, Massachusetts; and Denver, Colorado.

FOR ADDITIONAL INFORMATION ADDRESS INQUIRIES TO:

Regional Director
Bureau of Reclamation
P. O. Box 2553
Billings, Montana 59103

Project Manager
Riverton Projects Office
P. O. Box 31
Riverton, Wyoming 82501

MAY 1977

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Santo Domingo Tribe

OFFICE OF THE GOVERNOR P.O. BOX 99, SANTO DOMINGO PUEBLO, NEW MEXICO 87052 Telephone (505) 465-2214 (505) 242-9838

November 24, 1987

Senator Daniel K. Inouye, Chairman
Senate Select Committee on Indian Affairs
SH 722 Hart Building
Washington, DC 20510

Dear Senator Inouye:

I am writing on behalf of my Pueblo, the Pueblo of Santo Domingo, to express to you our profound disagreement with S. 1039, which would impose a two year moratorium on tribal tax programs and require Secretarial review and approval of all tribal taxes before they can be imposed upon any non-tribal persons. In our view, this proposed legislation is an improper response to concerns by persons who have heretofore had a complete exemption from contributing to the general cost of maintaining viable tribal governments within the various Indian reservations, but who derive benefit from the provision of tribal services and the maintenance of law and order within the reservations. My Pueblo has been self-governing for more than a thousand years, and we still maintain our traditional form of government, under which our tribal decisions are the product of great deliberation and consensual agreement. My Pueblo and its officers have been considering a tax program for the last two years, and it was only in April that we finally made the decision to go ahead and institute a possessory interest tax that would apply to non-Indians as well as our tribal members. This decision was carefully made and fully debated. We had expert legal advice, and the Council had the tax program designed so as to be fully compatible with the requirements of law and fairness. In fact, because of our desire to proceed with care and to assure that every Councilman felt comfortable with the proposed tribal law, as well as to ensure that the tax program will be compatible with our distinct traditional values and way of life, we only this month finalized the design of the tax program and tax office. Our tax notices to taxable entities have not been sent out yet, but we are confident that the taxpayers subject to our jurisdiction will have no substantial objections.

I want to emphasize that our demands upon tribal members, which long predate the first arrival of Europeans in 1540, are far more onerous than the modest financial levy required under our tax code. Tribal members are required to contribute much in the way of labor and goods for the well-being of the community. If selected as an officer or official of the Pueblo, a tribal member must contribute an entire year of his life to that duty, without pay. Each year nearly two dozen men face this obligation. Our Tribal Council of approximately 30 members serves for life, and members are subject to being summoned at any time. Our Councilmen likewise serve without pay. In addition, we practice the ancient tradition of performing community work, for the common good, which involves large numbers of both men and women, all of whom serve without pay, as part of their duty as tribal members. Moreover, as anyone familiar with the Pueblos knows, annually we participate in scores of traditional dances and other ceremonies that are time-consuming and very costly to individuals and families. Our people are very public spirited and show it nearly every day of the year. We look after one another like no non-Indian communities do, and it is very demanding of everyone especially the tribal government. To paraphrase one of the great Pueblo leaders in testimony before Congress in the 1920's, when non-Indians tried to steal our lands through legislation, it is most definitely not an easy business being a Pueblo Indian. You and the Select Committee, and every member of Congress who is interested in this taxation issue, should keep in mind that no non-Indian has to bear these traditional duties, which can accurately be analogized to taxes in-kind, and it is only proper and equitable for non-Indians inside our tribal boundaries to bear a small portion of the cost of maintaining a viable and effective government that benefits them in many tangible ways. It is noteworthy that the non-Indians within our lands are here voluntarily, not by any coercion. Some non-Indians aren't satisfied with the fact that they have taken much of the Indians' lands outside our boundaries, and that they have obtained rights to our lands within our boundaries, often against our will. The complaints should be viewed with this in mind, and Congress, to whom we look for protection, should withstand emotional and temporary expressions of discontent from people who yearn to take yet more of our precious rights.

I want to assure you that the several Pueblo Indian tribes are acting responsibly with our tax programs. We have met with one another to discuss the issue, in order to create a tolerable degree of uniformity and to ensure that taxpayers are provided full opportunities for hearings and protests. We have also had several meetings with representatives from the Bureau of Indian Affairs to get their views on the advisability and design of a tax program. Finally, the attorneys for the Pueblos have shared ideas and consulted one another, again in order to develop reasonable consistency in the structuring and implementation of tax programs. I don't believe, with all the care that has been put into this multi-tribal effort, that there is any legitimate basis for the alarm that S. 1039 represents.

My Pueblo appreciates the concern for our financial straits that Senator Melcher exhibits in Section 8 of the bill, and an infusion of sums such as proposed is needed whether the bill becomes law or not, but a moratorium is definitely not appropriate and would, in fact, discriminate against those tribes who have been very cautious and deliberate in their consideration of extending tribal taxes to non-Indians. If the legislation looks like it might actually pass, you may witness the sudden, ill-considered enactment of numerous taxes by lots of tribes in order to beat the statutory deadline for the moratorium. Our view is that the present system is far preferable and allows the tribes to move at their own pace.

Another problem with the bill is that Section 6 prohibits the Secretary from approving any tribal taxes for two years, which apparently would include even taxes on tribal members that are submitted to the Secretary as required by many tribal constitutions. There is absolutely no reason for such a restriction. We are likewise troubled by the use in the statute of the word "ordinance," which we regard as a demeaning term that minimizes the inherent sovereignty of our Pueblo. An ordinance is an enactment of a municipality, one of the most subordinate and minor units of government. We are not a municipality. Our sovereignty is inherent and ancient, and exists independent of any positive law and of the State of New Mexico. Although the Supreme Court describes a tribe as a "domestic, dependent nation," we are subject only to the Congress of the United States, and the Court has consistently reaffirmed our sovereign character, which is not true of any municipality. My Pueblo earnestly requests that the term "ordinance" be abandoned when referring to the tribes, and especially the Pueblos. We refer to the enactments of the Tribal Council as "Laws," and our tax laws now constitute a "Code." It is only proper, and accurate, to use terminology properly respectful of the authority of our tribal governments.

Recently the King of Spain, Juan Carlos, visited New Mexico and presented each Pueblo Governor a gold tipped cane, a symbolic recognition of our long-standing relationship with Spain, but much more. On Monday, November 23rd, all of the Governors met at my Pueblo to bless the canes and commemorate our ancient governments. During the seventeenth century, while New Mexico was under the dominion of the Spanish Crown, the King gave each Pueblo a cane of authority as a recognition of our right of self-government within the Spanish Empire. By good fortune of circumstance, the Crown's gesture harmonized with the existing Pueblo practice of respecting the authority of certain officers who held canes. These canes have always been of great importance to us and are concrete guarantees of our sovereignty. During the centuries we were also presented canes by the government of Mexico, and in 1864 President Lincoln conferred canes upon our Governors as a recognition of the continuing respect of the United States for our self-government. Finally, in 1980, during the tricentennial of the Pueblo Revolt, the only successful Indian revolt in American history, the Governor of the State of New Mexico presented each Governor with a new cane. Each one of these canes occupies a special and highly symbolic place in the Pueblos. The recent presentation by the King of Spain ratifies the original guarantee of our right of self-government by Spain, a right that the United States has pledged its good faith to protect. We owe much to the Spanish Crown, which wisely set forth laws that, although sometimes ignored or violated, were instrumental in assuring the survival of the Pueblos and the continued integrity of our governments. The proof of that is the simple fact that, although we were the first Indians in what is now the United States to confront European settlers, we are still situated in our villages, still, for the most part, in possession of our lands, still practicing our traditions, and still subject to our original governments. As a consequence, we have deep, abiding respect for our form of government and our right to make our own laws and practice self-government. Legislation such as S. 1039 threatens to restrict our rights, and for no good reason. When I compare the generous symbolic gesture of King Juan Carlos to the underlying anti-tribal motivation of legislation designed to impair tribal sovereignty, I am reminded that although this nation has admirable ideals and has shown great generosity of spirit, nonetheless there are deeper pathologies that sometimes rear their head. I urge the Congress to show the protective solicitude it has promised the Indian tribes of the nation by summarily rejecting S. 1039.

Sincerely,

Gov. Donicio Calabaza

Honorable Donicio Calabaza, Governor

West Shore, LaBella Ln.
Polson, MT 59860

The Honorable Senator Daniel K. Inouye, Chairman
Senate Committee on Indian Affairs
722 Hart Senate Building
Washington, D. C. 20510

Dear Senator Inouye:

This is a statement concerning Bill 1039 on Indian taxation. I strongly support a two-year moratorium on Tribal Government taxation and I also highly recommend a Congressional Committee to investigate the effects of Tribal taxation on reservation economies and on non-Tribal citizens, both off and on reservations, who are impacted by such taxes.

I have no confidence in any review of proposed ordinances by the Secretary of Interior or the Bureau of Indian Affairs. My experience with government without representation has shown that Tribal governments do not have any regard for non-Tribal citixens concerns on Tribal ordinances. Tax ordinances will be repressive and lack any non-Tribal imput.

During World War II, my outfit fought along-side of yours in Italy and I am not about to give up my Constitutional rights to the Indians.

Sincerely yours,

John E. Cramer

CHAIRMAN
Wayne Ducheneaux

SECRETARY
Arlene Thompson

TREASURER
Mona R. Cudmore I

VICE-CHAIRMAN
Everett Hunt

CHEYENNE RIVER SIOUX TRIBE

P.O. Box 590
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(605) 964-4155
(605) 964-4984

TRIBAL COUNCIL MEMBERS
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True Clown, Sr.
Vernon Mestes
DISTRICT 2
Ted Knife, Sr.
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Lanny LaPlant
DISTRICT 6
Calvin "Red" Traversie
Joan LeBeau

TESTIMONY
ON
S.1039

"To Review and Determine the
Impact of Indian Tribal
Taxation on Indian Reservations
and Residents."

By Mr. Wayne Leo Ducheneaux
Chairman
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, S.D. 57625
(605) 964-4155

The blue represents the thunder clouds above the world where live the thunderbirds who control the four winds. The rainbow is for the Cheyenne River Sioux People who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka—the Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth.

TESTIMONY OF WAYNE DUCHENEAUX

Chairman
Cheyenne River Sioux Tribe
Eagle Butte, South Dakota

We consider S.1039 to be a sorry breach of faith with the Indian tribes of this nation. Since discovery of our country by white men, we have witnessed the steady erosion of our land and our culture. You have taken away our ability to feed ourselves and replaced it with the unfulfilled promises of Federal Government sustenance. You have taken away our capability to roam free and confined us to reservations. You have taken away our land and replaced it with promises of economic development. You have taken away our government and replaced it with a microcosm of your own. You have, in effect, made us prisoners in our land guarded by a female warden you call Liberty, who stands forlorn in an ocean and gazes longingly towards the East.

But through it all, you cannot say we were not apt students. By your own reports and documented admissions, the record of the treatment of our people has been labeled a national shame. Although it was predicted that we would be destroyed or assimilated, we survived. However distasteful, we learned your ways but, more importantly, we learned your laws. In fact, we became students of your laws and began to use them to win back some of the rights taken from us. We began to demand that promises made be fulfilled. We took to heart your promises of self-government and began to govern ourselves by your laws. We enthusiastically embraced the promise of self-determination; and when the government reneged on its promises and cut back on Federal funding for Indian programs, we set out determined to insure that our people and way of life would survive the encroachment of the dominant society. We began to initiate more and more your form of government, first, by taxing our own members and then by taxing any who would reside in our territory; which, incidentally, we reserved for our absolute and undisturbed use and occupation.

I guess the question that needs to be asked is, does the United States Congress believe in Indian self-determination, or is this just another mellifluent buzz word coined to placate the ignorant savage? You made the treaties, not us; you made the laws, not us; your courts interpreted them, not ours. So, I submit, Senators, that if self-government and self-determination are to mean more than empty rhetoric espoused by the President and Congress, then this bill, S.1039, must never see the light of day.

The power to tax is an inherent power of any form of government. Taxation has become increasingly more important to Indian tribes as they progress. This is augmented by the intensified need for improved self-government and territorial management. It is simply good judgement for a tribal government to consider taxation as a means of providing services to its members and for regulating the non-Indian activities on the reservation. The Committee is well aware of the fact that without revenue you cannot govern.

Yet, Senators Melcher, Simpson and Baucus would reserve this right only for themselves and deny Indian governments their right to exercise their inherent powers to levy and collect taxes. This is proposed under the guise of equality, justice and dignity but is, in fact, a sell-out by Senators Melcher, Simpson and Baucus to ACE, PARR and other anti-Indian hate groups. These elected representatives of the people use as their justification for denying tribal rights, the pretense that tribal taxation would have an adverse economic impact on Indian reservations.

It is unclear to me, and I submit, unclear to them, exactly what they mean by this. Contrary to popular belief in the non-Indian world, Indians do pay taxes. We pay the same taxes non-Indians pay, the only exception being property taxes on lands held in trust by the Federal Government. These then are not new taxes being imposed on residents of the reservation but simply tribes replacing State and County taxes with their own. Rather than cause an adverse impact on the reservation economy this would have the opposite effect.

Tax dollars collected by the States and Counties are spent off the reservation with little, if any, of the services bought by these tax dollars ever reaching the Indian people. With tribal taxation these tax dollars would stay on the reservation and help build up the local economy. It is interesting to note that Senators Simpson, Melcher and Baucus didn't rush to legislation when States and Counties were illegally taxing Indians and their lands.

Senator Simpson, in a letter to the Arapaho/Shoshone joint Business Council, stated that the bill would merely provide for the Secretary of Interior to review any tribal tax ordinance before becoming operational. Inherent tribal powers can only be curtailed by express acts of Congress, and to do so now by allowing Secretarial review of the tribal taxation ordinances, would serve no good purpose. S.1039 would encourage paternalism and widen the gap between the majority and the minority.

Tribes will survive the ravages of Gramm-Rudman and the President's attempts to balance the budget on the backs of the Poor and Disadvantaged only if they can manage all the local revenue they can obtain.

The Senators Melcher, Simpson and Baucus dangle the carrot of a 525,000,000 dollar authorization to appease the tribes in a futile attempt to garner Indian support for their bill. If they are really sincere, let them amend the language of their bill to read, "THERE ARE APPROPRIATED 450,000,000 DOLLARS TO ALLEVIATE ECONOMIC HARDSHIP ON INDIAN RESERVATIONS AND 75,000,000 DOLLARS TO ALLEVIATE EMERGENCY HEALTH CARE NEEDS ON INDIAN RESERVATIONS".

It is a shameful deed that is being proposed in this legislation, especially as this nation prepares to celebrate the 200th Anniversary of its Constitution. S.1039 flies in the face of the treaties and promises made pursuant to the Constitution. Regardless of the outcome of this bill, as long as there is one Indian left alive, we will continue to fight for our rights and the fulfillment of the promises made to us.

Although the battlefield and weapons may be different, the words of Crazy Horse and the other great chiefs, "to fight to the last man" will ring true today, tomorrow and to the last man.

THE JICARILLA APACHE TRIBE
P. O. BOX 507 • DULCE, NEW MEXICO 87528

COMMENTS OF LEONARD ATOLE, PRESIDENT OF THE JICARILLA APACHE TRIBE CONCERNING S. 1039

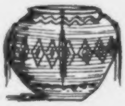
Introduction

The Jicarilla Apache Tribe strongly opposes enactment of S.1039. This Bill would reverse the Supreme Court decision of Kerr-McGee Corp. v. Navajo Tribe, by requiring Secretarial approval of all Tribal taxes. The Bill would also impose a two year moratorium on Secretarial approval of any new Tribal taxes. S.1039 represents a major reversal of the federal government's policy toward Indian Tribes for the last fifty years. The Bill would seriously undermine the progress made by the Indian Tribes toward self-government and economic self-sufficiency, and would increase the dependency of the Tribes on federal funding.

S.1039 reflects a fundamental misunderstanding of the facts of Tribal and State taxation of activity on the Reservations and the services provided by the Tribes and the States on the Reservations. S.1039 assumes incorrectly that Tribal taxation is a problem, while State taxation is not a problem. S.1039 assumes incorrectly that the States are providing services to Indians and non-Indians on the Reservations that justify the taxes imposed by the States on Reservation activity. S.1039 assumes incorrectly that the Indian Tribes are not capable of making for themselves the difficult public policy decisions any government must make in the area of taxation and economic development. The Jicarilla Apache Tribe submits that the facts do not support these unstated and erroneous assumptions behind S.1039. This Bill is founded on mistaken assumptions of fact and should be rejected by the Senate.

State Taxes, Not Tribal Taxes, Have Become An Unjustified Burden On Economic Activity On The Reservations.

The fundamental defect in this Bill is that it assumes that Tribal taxes are a problem. Section 2(d) of the Bill states that Congress finds Tribal taxes will have an adverse economic impact on Reservations to the disadvantage of tribal and non-tribal persons residing there. Thus, the bill singles out Tribal taxes as a problem, while not addressing State taxes at all. The real issue concerning multiple taxation (by both the Tribes and the States) is whether the State taxes are lawful. The trend of the decisions of the Supreme Court over the last twenty years is to support Tribal taxes and to strike down State taxes. For example, the Ninth Circuit Court of Appeals has recently invalidated State severance taxes on Reservation coal in Crow Tribe v. State of Montana, 819 F.2d 895 (9th Cir. 1987). If multiple taxation is a problem, Congress should be investigating the



prohibition of State taxes, not Tribal taxes. Yet, the proposed moratorium on new taxes applies only to Tribal taxes. Nothing in the Bill would prohibit the States from continuing to collect their taxes, or even increasing them, during the two year moratorium.

State taxation of Tribal mineral resources provides a clear example of the inequity of State taxation of Reservation activity. During 1981 to 1985 New Mexico imposed five different taxes on oil and gas production on the Jicarilla Apache Reservation, totalling approximately 8% of production. During the same period, the Jicarilla Apache Tribe imposed two taxes on oil and gas activities totalling approximately 6% of production. The combined State and Tribal tax burden on oil and gas production on the Reservation was therefore approximately 14% of production, compared to 8% off the Reservation. This higher tax burden puts Jicarilla Apache oil and gas at a competitive disadvantage compared to off-Reservation minerals. It is this multiple tax burden, not Tribal taxation alone, that has the potential for discouraging economic development on the Reservation.

The right of the Tribes to tax activity on their own Reservations has been consistently upheld by the Supreme Court, most forcefully in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The power to tax is an essential component of self-government and economic regulation by the Tribe of activity on the Reservation. Therefore, in addressing the potential problems from multiple taxation on the Reservation, Congress must address the legitimacy of State taxation, and not merely assume State taxation is unobjectionable.

Between 1981 and 1985, tax revenues to the State of New Mexico from oil and gas production on the Jicarilla Apache Reservation amounted to $47,483,306. During that same period, State-funded services to the Jicarilla Apache Reservation totalled $10,704,748, primarily for public schools. Thus, the State received almost five dollars in taxes from Jicarilla Apache oil and gas for every dollar it spent on the Reservation. This flow of revenue off the Reservation amounts to a Tribal subsidy to the State and deprives the Tribe of potential revenue to fund services to both Indians and non-Indians on the Reservation. The State of New Mexico has not provided, and does not now provide, services to Reservation residents, whether Indian or non-Indian, equivalent to the services it provides off the Reservation. Therefore, it is State taxation, not Tribal taxation, that imposes unjustified burdens on Reservation businesses.

The Indian Tribes Have Not Abused Their Lawful Taxing Authority

This Bill assumes that Congress must intervene in the area of Tribal taxation in response to "protests" from "nontribal persons" subject to those taxes. (Section 2(c) of the Bill). No doubt, some taxpayers have protested some Tribal taxes. No one enjoys paying taxes. But the real question is whether those protests are well-founded. It is the experience of the Jicarilla Apache Tribe that businesses on the Reservation do not object per se to Tribal taxes. Rather, if they object at all, they object to multiple taxes by both the Tribe and the State. Again, any evaluation of Tribal taxes must also investigate the level of State taxes on the Reservation and the level of State services on the Reservation. The Jicarilla Apache Tribe submits that any objective evaluation of the overall level of taxation on the Reservations will lead to the conclusion that State taxes, not Tribal taxes, are excessive.

The Jicarilla Apache Tribe recognizes that the level of taxation is not the only legitimate concern of taxpayers. Every taxpayer expects and is entitled to a fair and honest tax system. The tax programs enacted by the Jicarilla Apache Tribe afford taxpayers full and extensive procedures for protesting the imposition or the amount of the tax. For example, the Possessory Interest Tax recently enacted by the Tribal Council provides an administrative appeal procedure for protesting an assessment, a denial of a claim for exemption, a determination of value, or any other matter relating to the tax. Protests are submitted to the Mineral and Water Resources Committee of the Tribe. The tax ordinance provides for hearings before this body and an appeal to the Tribal Court. The protesting taxpayer may present evidence and argument and be represented by counsel of its choice. Further appeals may be taken to the Court of Appeals of the Jicarilla Apache Tribe. Protested taxes are held in a segregated account, and interest is paid on any refund.

These procedures guarantee every taxpayer a fair hearing and due process, and are at least as protective of taxpayers' rights as most State tax laws. The tax ordinance does not differentiate in any way between members and non-members of the Tribe. All are entitled to the same protections and are subject to the same obligations. State taxes do not grant an exemption to non-citizens of the State who engage in taxable activity in the State. Neither do Tribal taxes grant an exemption to non-citizens of the Tribe who engage in taxable activity on the Reservation. Yet all taxpayers enjoy the same equal protections of the Jicarilla Apache tax laws, without regard to their membership in the Tribe.

The failure of S.1039 to recognize the due process and equal protection provided by the Jicarilla Apache taxes reflects a sharp departure from the current federal policy of encouraging Tribal self-determination and strengthening of Tribal governments. The Bill not only would deprive the Tribes of revenues they need for essential governmental functions. The Bill would also usurp the authority of the Tribes to decide for themselves when and how much to tax. This attack on the authority of Tribal governments is not based on proof that the Tribes have acted irresponsibly. The record of the Jicarilla Apache Tribe shows the exact opposite. This Tribe, as well as all others familiar to our Tribal Council, has acted prudently and responsibly in response to federal budget cuts that decreased the traditional source of Tribal revenues. The Jicarilla Apache Tribe is perfectly capable of evaluating the economic benefits and negative impacts of taxation on business activity within the Reservation. The Tribe's own self interests are to encourage, not to discourage, business activity on the Reservation. It is the Tribes who will suffer most if businesses are driven off the Reservation. It is insulting and completely unjustified to assume that Tribal governments do not understand the economic costs and benefits of taxation, and therefore must be deprived of one of the central powers of government--the power to tax. Self-government and self-determination are meaningless if these important decisions about the economic development of our Reservation are taken away from the Tribal government.

Congress has no basis to assume that the Jicarilla Apache Tribal Council, or Tribal governments in general, are any less capable of making these public policy decisions than are State and federal governments. Federal Indian policy has long been to encourage and to strengthen Tribal governments so that the Tribes can determine their own destinies and overcome the decades of excessive dependency on the Bureau of Indian Affairs. The authority to tax activity on the Reservation is an essential part of self-government. Suspending the Tribes' authority to tax, based on no showing of any significant abuse of that authority, would undermine Tribal governments at the very time they are called upon to fill the financial gap caused by federal budget cuts.

The Authorization Of Additional Federal Expenditures On The Reservations Is Inadequate And Unrealistic

The Bill authorizes, but does not appropriate, $525 million a year for two years to compensate the Tribes for the suspension of their taxing authority. The Jicarilla Apache Tribe is not so naive to believe this authorization will ever materialize into an actual appropriation. The actual dollar figure in any final Act will be much smaller, given the federal government's deficit problems. Any payment to the Tribes to offset the loss of revenues from new taxes would have to make up for six years of budget cuts, plus the future revenues the lost taxes would have generated. The Bill does not explain how this dollar figure was calculated and does not show that the Tribes will not suffer economically by cutting off their lawful authority to tax business activity on their Reservations. If this Bill is to be given any serious consideration, the sponsors or the Department of the Interior must explain and justify the $525 million figure. The Congress has a trust responsibility to the Tribes, reaffirmed by both Congress and the Courts since the founding of the United States. Any action by the Congress to deprive the Tribes of their lawful taxing authority, even temporarily, must assure that the Tribes will be held harmless in terms of lost revenues.

But even if the Congress authorized and appropriated sufficient funds to fully compensate the Tribes for the suspension of their taxing powers, the Jicarilla Apache Tribe would oppose this Bill. The Tribe's sovereign powers are not for sale. We have no desire to return to the days of total dependency on the federal government to fund our governmental functions. We have taken seriously the federal policies of self-determination and self-sufficiency. We have acted responsibly and prudently in the exercise of our inherent authority to tax. We have protected the legitimate interests of the taxpayers within our jurisdiction, Tribal members and non-members alike. Suspending this essential aspect of Tribal self-government, when the Tribes have acted responsibly, would amount to a breach of faith by the Congress.

JAT-1039.DOC (SFO)

CITIZEN BAND POTAWATOMI
INDIANS OF OKLAHOMA
Route 5 Box 151 Shawnee, Oklahoma 74801
Phone 405-275-3121

Chairman
John "Rocky" Barrett

Secretary-Treasurer
Bob Davis

September 17, 1987

Congressman Mike Synar
1713 Longworth Bldg.
Washington, D.C. 20510

Dear Congressman Synar:

I am writing to you to express concern over S.B. 1039 "A Bill to Review and Determine the Impact of Indian Tribal Taxation on Indian Reservations and Residents". This bill poses a very threatening situation to the Indians in Oklahoma. The late Oklahoma Representative John T. Levergood would term this bill a "wooly booger".

This bill calls for a three year moratorium on tribal taxation and to subject tribal tax codes to Secretarial approval. This bill would result in the Tribe being unable to impose sales tax on such items as cigarettes and other goods sold in tribal stores or stores currently operating under Federally approved tax ordinances and licensed by the Tribe. This would result in the sale of untaxed items, thus resulting in the states attempting to shut down such businesses for having unstamped/untaxed "contraband". The State of Oklahoma is currently under a restraining order by Federal Courts (see attached). This bill is a direct attempt to legally infringe on the inherent and treaty rights of Indian tribal governments to levy and collect taxes. Since the Oklahoma Constitution prohibits State jurisdiction over Indian lands, the end result is a constitutional change by Federal legislation and a violation of sovereign Indian rights to self government.

This bill will be reviewed in hearings before the Senate Select Committee on Indian Affairs on October 13, 1987. The Citizen Band Potawatomi Business Committee request that you oppose passage of such a detrimental piece of legislation as S.B. 1039.

Thank you for your time in this most important matter.

Sincerely,

Francis Levier,
Tribal Administrator

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED
[illegible]
ROBERT D. DENNIS
CLERK, U.S. DISTRICT COURT
BY ______________
DEPUTY

THE CITIZEN BAND POTAWATOMI)
INDIAN TRIBE OF OKLAHOMA,)
)
Plaintiff,)
)
vs.) No. CIV-87-0338-W
)
THE OKLAHOMA TAX COMMISSION;)
CINDY RAMBO, CHAIRMAN OF THE TAX)
COMMISSION; ROBERT L. WADLEY,)
VICE-CHAIRMAN OF THE TAX)
COMMISSION; and DON KILPATRICK,)
SECRETARY OF THE TAX COMMISSION,)
)
Defendants.)

ORDER

This matter came on for hearing on February 25, 1987, on the Motion for Preliminary Injunction of the plaintiff, The Citizen Band Potawatomi Indian Tribe. Having heard the arguments of counsel and having considered the authorities submitted by the parties, the Court makes its determination with regard to the plaintiff's request that the Court preliminarily enjoin the defendants, the Oklahoma Tax Commission and its three appointed members, Cindy Rambo, Chairman, Robert L. Wadley, Vice-Chairman, and Don Kilpatrick, Secretary, and their agents and employees

(1) from enforcing or attempting to enforce the regulatory and taxing authority of the state of Oklahoma to assess a cigarette tax against the plaintiff, its officers, agents or employees and

(2) from entering the plaintiff's land.

PIERSON, BALL & DOWD
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Oklahoma City, Oklahoma

Although many of the arguments submitted by the parties in their memoranda pertain to the proposed assessment against John Barrett, Jr., the Court has disregarded the same and has considered only the arguments pertaining to taxation of the plaintiff since the parties have agreed that the assessment against Mr. Barrett has been withdrawn, Plaintiff's Exhibit B, and since the defendants have now issued an assessment in the amount of $2,691,470.70 against the plaintiff for its failure to remit cigarette taxes allegedly due from the sale of cigarettes by the plaintiff from December 1, 1982, through September 30, 1986.

The plaintiff is a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. §§ 501-510. In an effort to become self-sufficient, the plaintiff has engaged in various enterprises including a convenience store known as the "Potawatomi Tribal Store" a/k/a the "Gallery Trading Post" [the Store] located in Shawnee, Oklahoma. The Store was constructed with funds secured through a Community Development Block Grant from the United States Department of Housing and Urban Development and is situated on land held in trust by the United States for the benefit of the plaintiff.

Since August 1982, the plaintiff has sold cigarettes to both Indians and non-Indians and since 1984, such sales have occurred at the Store. All cigarette packages sold by the plaintiff were affixed with the plaintiff's own tax stamp. These sales generated approximately $184,031.00 in taxes and $595,035.00 in profits and the total of these amounts constituted approximately five to ten percent (5% to 10%) of the plaintiff's total revenue. The sale and taxing of these cigarettes were done pursuant to tribal ordinances which were approved by the federal government and published in the Federal Register. Plaintiff's Exhibit A to Complaint.

The defendants are charged with enforcing state tax laws including those provisions found in Article 3 of the Oklahoma Tax Code, 68 O.S. §§ 301-324, which impose a tax on the sale and consumption of cigarettes. Individuals selling cigarettes in the state of Oklahoma must be licensed by the state and must purchase and affix state tax stamps to the packages before selling the same.

The instant plaintiff has never purchased, nor been required to purchase, a state license to sell cigarettes. Likewise, the defendants have never assessed and the plaintiff has never collected a state tax on the sale of cigarettes on tribal trust land.

In this circuit, four criteria must be satisfied before a preliminary injunction will be issued. The movant must make a prima facie showing

> "'(1) . . . that the injunction would not be adverse to the public interest; (2) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; (3) that the movant will suffer irreparable injury unless the injunction issues; and (4) that there is a substantial likelihood that the movant will eventually prevail on the merits."

Koerpel v. Heckler, 797 F.2d 858, 866 (10th Cir. 1986)(quoting City of Chanute v. Kansas Gas & Electric Co., 754 F.2d 310, 312 (10th Cir. 1985)(citing Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1981)).

In an effort to demonstrate that it has made the necessary showing, the plaintiff has argued first that the public interest is best served by issuing the preliminary injunction since there is a strong possibility of violent physical confrontation should the defendants attempt to assert their authority over the plaintiff. The defendants while not disputing this statement have argued that the proposed injunction would be adverse to the public interest since the state of Oklahoma is being confronted with increasing demands for state services and with declining state revenues and that any delay in collecting this validly imposed tax only aggravates this situation.

The plaintiff has contended with regard to the second and third elements that it will suffer irreparable injury if this interim relief is not granted since the defendants' actions in assessing the plaintiff not only invade its status as a sovereign free from the exercise of state jurisdiction but also threaten to deprive the plaintiff of needed income. The plaintiff has argued that the defendants on the other hand will suffer no irreparable injury since any delay in assessing and collecting this tax, should it be determined to be validly imposed, can be remedied by the automatic accrual of penalty and interest provided by Oklahoma statutes. The defendants do not contest the plaintiff's statements regarding the harm that it might suffer should the injunction not issue. They have instead relied on their earlier argument that the state is undergoing an economic crisis.

The Court finds that the plaintiff has made a prima facie showing that the foregoing three criteria exist and in particular has demonstrated that the threatened injury to the plaintiff outweighs whatever damage the proposed injunction may cause to the defendants especially since corrective relief is available to the defendants in terms of penalty and interest should the plaintiff be required to remit this tax. In so doing, the plaintiff's burden with regard to demonstrating the fourth criterion is lessened. Where the plaintiff has prevailed on the other factors,

> "'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.'"

Koerpel, 797 F.2d at 866 (quoting Lundgrin, 619 F.2d at 63).

In light of recent decisions by the United States Supreme Court and of the varying interpretations of the same advanced by the parties, it is clear that the plaintiff has raised serious and substantial questions as to the authority of the defendants to collect from the plaintiff taxes on cigarettes sold to both Indians and non-Indians on land held in trust for the plaintiff by the federal government. Such questions demand "more deliberate investigation" and to allow this inquiry to occur in an atmosphere unclouded by threat of economic deprivation to the plaintiff and/or physical confrontation between the parties, the Court finds that the preliminary injunction should issue. Such interim relief should not unduly interfere with the State's internal economy and administration but will preserve the status quo and disengage the statutory proceedings triggered by the proposed assessment until a final determination on the issues involved herein can be made.

The final relief requested by the plaintiff pertains to the posting of a bond. The plaintiff has contended that the Court in the exercise of its discretion should not require a bond in the absence of any irreparable harm to the defendants and further has argued that Rule 65(c), F.R.Civ.P., which eliminates the necessity of a bond when the United States is involved should apply with equal force to this plaintiff. The defendants have argued that a bond is required by again asserting that it would be detrimental to the state's financial situation.

In weighing the practicalities of the situation as it did when it determined that the injunction should issue and without commenting on whether Rule 65(c) is applicable to this plaintiff, the Court finds that the plaintiff will not be required to post a bond pending resolution of the merits of this matter.

Accordingly, the Court finds that the plaintiff's Motion for Preliminary Injunction should be and is hereby GRANTED and the defendants, their agents and employees are hereby ENJOINED from enforcing or attempting to enforce the regulatory and taxing authority of the State of Oklahoma to assess a cigarette tax against the plaintiff, its officers, agents or employees and from entering the plaintiff's land to enforce or attempt to enforce such regulatory and taxing authority until final determination of this suit.

It is so ORDERED this 10th day of March, 1987.

Lee West

LEE R. WEST
UNITED STATES DISTRICT JUDGE

Box 183
Big Arm, Mt.59910
November 17,1987

Senator Daniel K. Inouye
Chairman, Senate Committee on Indian Affairs
722 Hart Senate Office Bldg.
Washington, D.C. 20510

Ref: Statement for Hearing on
Senate Bill # 1039

Dear Senator Inouye,

We wish to make a statement for your hearing of Senate Bill #1039. In our state of Montana the Blackfeet Tribe and the Fort Peck Tribe have passed and implemented taxes and the Crow Tribe is considering a tax. Further, the concensus of the Montana tribes predicts that all seven Tribes in Montana will have tax laws within two years even though our local tribe insists they are not even thinking this way. We are very concerned because of the records of tribal taxes in this state and others have demonstrated that tribal tax policies are capricious, excessive and repressive not only to non-indians but indians alike. The Blackfeet 4% tax is about four (4) times the present tax structure in Montana. The Blackfeet taxes also are increasing utility rates affecting many people off the Reservation. Further, tribal tax policies can do anything to anyone at any time. These policies can be selective by race, politics, business, etc. and even oppresive to their own members. U.S. laws by voted representation helps to prevent this for most of it's citizens, however present Reservation laws prevent this. The BIA states they only represent Tribal members so who is representing us non-tribal members (U.S.citizens) on so called reservations but still within the United States? We have been to Tribal hearings on their ordinances which are racial in that there are different rules for tribal vs non-tribal members. No representation really is felt. Government without representation is not the American way!! Here in Lake County, Montana which includes most of the Flathead Reservation, the indian population is about 15% making the non-indian population 85% which owns about 50% of the land in Government Fee Title. The Flathead Tribe is already charging a recreation, hunting and fishing fee (Tax) with rights to search. Business and property values are already affected. If tribal taxes were implemented here in Lake County, this w ould be control and taxation by 15% of the population (who have a Tribal vote) over 85% of the population (which have NO Tribal vote) !! Also, the non-taxable land status of Indian lands pose an added financial burden on adjacent county governments and non-indian tax payers. This sounds like a Boston Tea Party situation.

** Refer to attached page of a newspaper clipping- Great Falls Tribune - March 16,1987

We therefore urge you to do the following:

1. Establish a two year moratorium on tribal taxes until a study of their effects and solutions of problems can be made.
2. A non-partial Congressional Committee (Not Presidential) should study the impacts of Federal Indian Policies - including taxes - on the non-tribal indians as well as the non-indians living on or near Indian reservations.
3. NO money be given the BIA or Tribes without the requirement that the Government Accounting Office be allowed and have the ability to audit tribal and/or BIA records for public accountability.

Sincerely,
John Monteith III
John Monteith III
Diane R. Monteith
Diane R.Monteith

Box 183
Big Arm, Montana 59910

C.C. to-Senator John Melcher
Senator Max Baucus

PUEBLO OF LAGUNA
P.O. BOX 194
LAGUNA, NEW MEXICO 87026

Office of:
The Governor
The Secretary
The Treasurer

(505) 243-7616
(505) 552-6654
(505) 552-6655

COMMENTS OF THE PUEBLO OF LAGUNA CONCERNING S. 1039

Introduction

The Pueblo of Laguna strongly opposes enactment of S.1039. This Bill would reverse the Supreme Court decision of Kerr-McGee Corp. v. Navajo Tribe, by requiring Secretarial approval of all Tribal taxes. The Bill would also impose a two year moratorium on Secretarial approval of any new Tribal taxes. S.1039 represents a major reversal of the federal government's policy toward Indian Tribes for the last fifty years. The Bill would seriously undermine the progress made by the Indian Tribes toward self-government and economic self-sufficiency, and would increase the dependency of the Tribes on federal funding.

S.1039 reflects a fundamental misunderstanding of the facts of Tribal and State taxation of activity on the Reservations and the services provided by the Tribes and the States on Reservations. S.1039 assumes incorrectly that Tribal taxation is a problem, while State taxation is not a problem. S.1039 assumes incorrectly that the States are providing services to Indians and non-Indians on the Reservations that justify the taxes imposed by the States on Reservation activity. S.1039 assumes incorrectly that the Indian Tribes are not capable of making for themselves the difficult public policy decisions any government must make in the area of taxation and economic development. The Pueblo of Laguna submits that the facts do not support these unstated and erroneous assumptions behind S.1039. This Bill is founded on mistaken assumptions of fact and should be rejected by the Senate.

State Taxes, Not Tribal Taxes, Have Become An Unjustified Burden On Economic Activity On The Reservations.

The fundamental defect in this Bill is that it assumes that Tribal taxes are a problem. Section 2(d) of the Bill states that Congress finds Tribal taxes will have an adverse economic impact on Reservations to the disadvantage of tribal and non-tribal persons residing there. Thus, the bill singles out Tribal taxes as a problem, while not addressing State taxes at all. The real issue concerning multiple taxation (by both the Tribes and the States) is whether the State taxes are lawful. The trend of the decisions of the Supreme Court over the last twenty years is to support Tribal taxes and to strike down State taxes. For example, the Ninth Circuit Court of Appeals has recently invalidated State severance taxes on Reservation coal in Crow Tribe v. State of Montana, 819 F.2d 895 (9th Cir. 1987). If multiple taxation is a problem, Congress should be investigating the prohibition of State taxes, not Tribal taxes. Yet, the proposed moratorium on new taxes applies only to Tribal taxes. Nothing in the Bill would prohibit the States from continuing to collect their taxes, or even increasing them, during the two year moratorium.

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The failure of S.1039 to recognize the due process and equal protection provided by the Pueblo of Laguna taxes reflects a sharp departure from the current federal policy of encouraging Tribal self-determination and strengthening of Tribal governments. The Bill not only would deprive the Tribes of revenues they need for essential governmental functions. The Bill would also usurp the authority of the Tribes to decide for themselves when and how much to tax. This attack on the authority of Tribal governments is not based on proof that the Tribes have acted irresponsibly. The record of the Pueblo of Laguna shows the exact opposite. This Tribe, as well as all others familiar to our Tribal Council, has acted prudently and responsibly in response to federal budget cuts that decreased the traditional source of Tribal revenues. The Pueblo of Laguna is perfectly capable of evaluating the economic benefits and negative impacts of taxation on business activity within the Reservation. The Tribe's own self interests are to encourage, not to discourage, business activity on the Reservation. It is the Tribes who will suffer most if businesses are driven off the Reservation. It is insulting and completely unjustified to assume that Tribal governments do not understand the economic costs and benefits of taxation, and therefore must be deprived of one of the central powers of government--the power to tax. Self-government and self-determination are meaningless if these important decisions about the economic development of our Reservation are taken away from the Tribal government.

Congress has no basis to assume that the Pueblo of Laguna, or Tribal governments in general, are any less capable of making these public policy decisions than are State and federal governments. Federal Indian policy has long been to encourage and to strengthen Tribal governments so that the Tribes can determine their own destinies and overcome the decades of excessive dependency on the Bureau of Indian Affairs. The authority to tax activity on the Reservation is an essential part of self-government. Suspending the Tribes' authority to tax, based on no showing of any significant abuse of that authority, would undermine Tribal governments at the very time they are called upon to fill the financial gap caused by federal budget cuts.

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POL-1039

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COMMENTS OF THE PUEBLO OF SANTA ANA CONCERNING S. 1039

Introduction

The Pueblo of Santa Ana strongly opposes enactment of S.1039. This Bill would reverse the Supreme Court decision of Kerr-McGee Corp. v. Navajo Tribe, by requiring Secretarial approval of all Tribal taxes. The Bill would also impose a two year moratorium on Secretarial approval of any new Tribal taxes. S.1039 represents a major reversal of the federal government's policy toward Indian Tribes for the last fifty years. The Bill would seriously undermine the progress made by the Indian Tribes toward self-government and economic self-sufficiency, and would increase the dependency of the Tribes on federal funding.

S.1039 reflects a fundamental misunderstanding of the facts of Tribal and State taxation of activity on the Reservations and the services provided by the Tribes and the States on Reservations. S.1039 assumes incorrectly that Tribal taxation is a problem, while State taxation is not a problem. S.1039 assumes incorrectly that the States are providing services to Indians and non-Indians on the Reservations that justify the taxes imposed by the States on Reservation activity. S.1039 assumes incorrectly that the Indian Tribes are not capable of making for themselves the difficult public policy decisions any government must make in the area of taxation and economic development. The Pueblo of Santa Ana submits that the facts do not support these unstated and erroneous assumptions behind S.1039. This Bill is founded on mistaken assumptions of fact and should be rejected by the Senate.

State Taxes, Not Tribal Taxes, Have Become An Unjustified Burden On Economic Activity On The Reservations.

The fundamental defect in this Bill is that it assumes that Tribal taxes are a problem. Section 2(d) of the Bill states that Congress finds Tribal taxes will have an adverse economic impact on Reservations to the disadvantage of tribal and non-tribal persons residing there. Thus, the bill singles out Tribal taxes as a problem, while not addressing State taxes at all. The real issue concerning multiple taxation (by both the Tribes and the States) is whether the State taxes are lawful. The trend of the decisions of the Supreme Court over the last twenty years is to support Tribal taxes and to strike down State taxes. For example, the Ninth Circuit Court of Appeals has recently invalidated State severance taxes on Reservation coal in Crow Tribe v. State of Montana, 819 F.2d 895 (9th Cir. 1987). If multiple taxation is a problem, Congress should be investigating the prohibition of State taxes, not Tribal taxes. Yet, the proposed moratorium on new taxes applies only to Tribal taxes. Nothing in the Bill would prohibit the States from continuing to collect their taxes, or even increasing them, during the two year moratorium.

The right of the Tribes to tax activity on their own Reservations has been consistently upheld by the Supreme Court, most forcefully in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The power to tax is an essential component of self-government and economic regulation by the Tribe of activity on the Reservation. Therefore, in addressing the potential problems from multiple taxation on the Reservation, Congress must address the legitimacy of State taxation, and not merely assume State taxation is unobjectionable.

State taxes produce a flow of revenue off the Reservation which amounts to a Tribal subsidy to the State and deprives the Tribe of potential revenue to fund services to both Indians and non-Indians on the Reservation. The State of New Mexico has not provided, and does not now provide, services to Reservation residents, whether Indian or non-Indian, equivalent to the services it provides off the Reservation. Therefore, it is State taxation, not Tribal taxation, that imposes unjustified burdens on Reservation businesses.

The Indian Tribes Have Not Abused Their Lawful Taxing Authority

This Bill assumes that Congress must intervene in the area of Tribal taxation in response to "protests" from "nontribal persons" subject to those taxes. (Section 2(c) of the Bill). No doubt, some taxpayers have protested some Tribal taxes. No one enjoys paying taxes. But the real question is whether those protests are well-founded. It is the experience of the Pueblo of Santa Ana that businesses on the Reservation do not object per se to Tribal taxes. Rather, if they object at all, they object to multiple taxes by both the Tribe and the State. Again, any evaluation of Tribal taxes must also investigate the level of State taxes on the Reservation and the level of State services on the Reservation. The Pueblo of Santa Ana submits that any objective evaluation of the overall level of taxation on the Reservations will lead to the conclusion that State taxes, not Tribal taxes, are excessive.

The Pueblo of Santa Ana recognizes that the level of taxation is not the only legitimate concern of taxpayers. Every taxpayer expects and is entitled to a fair and honest tax system. The tax programs enacted by the Pueblo of Santa Ana afford taxpayers full and extensive procedures for protesting the imposition or the amount of the tax. For example, the Possessory Interest Tax enacted by the Pueblo of Santa Ana provides an administrative appeal procedure for protesting an assessment, a denial of a claim for exemption, a determination of value, or any other matter relating to the tax. Protests are submitted to a special Tax Protest Panel. The tax ordinance provides for hearings before this body and an appeal to the Tribal Court. The protesting taxpayer may present evidence and argument and be represented by counsel of its choice. Protested taxes are held in a segregated account, and interest is paid on any refund.

These procedures guarantee every taxpayer a fair hearing and due process, and are at least as protective of taxpayers' rights as most State tax laws. The tax ordinance does not differentiate in any way between members and non-members of the Tribe. All are entitled to the same protections and are subject to the same obligations. State taxes do not grant an exemption to non-citizens of the State who engage in taxable activity in the State. Neither do Tribal taxes grant an exemption to non-citizens of the Tribe who engage in taxable activity on the Reservation. Yet all taxpayers enjoy the same equal protections of the Pueblo of Santa Ana tax laws, without regard to their membership in the Pueblo.

The failure of S.1039 to recognize the due process and equal protection provided by the Pueblo of Santa Ana taxes reflects a sharp departure from the current federal policy of encouraging Tribal self-determination and strengthening of Tribal governments. The Bill not only would deprive the Tribes of revenues they need for essential governmental functions. The Bill would also usurp the authority of the Tribes to decide for themselves when and how much to tax. This attack on the authority of Tribal governments is not based on proof that the Tribes have acted irresponsibly. The record of the Pueblo of Santa Ana shows the exact opposite. This Tribe, as well as all others familiar to our Tribal Council, has acted prudently and responsibly in response to federal budget cuts that decreased the traditional source of Tribal revenues. The Pueblo of Santa Ana is perfectly capable of evaluating the economic benefits and negative impacts of taxation on business activity within the Reservation. The Tribe's own self interests are to encourage, not to discourage, business activity on the Reservation. It is the Tribes who will suffer most if businesses are driven off the Reservation. It is insulting and completely unjustified to assume that Tribal governments do not understand the economic costs and benefits of taxation, and therefore must be deprived of one of the central powers of government--the power to tax. Self-government and self-determination are meaningless if these important decisions about the economic development of our Reservation are taken away from the Tribal government.

Congress has no basis to assume that the Pueblo of Santa Ana, or Tribal governments in general, are any less capable of making these public policy decisions than are State and federal governments. Federal Indian policy has long been to encourage and to strengthen Tribal governments so that the Tribes can determine their own destinies and overcome the decades of excessive dependency on the Bureau of Indian Affairs. The authority to tax activity on the Reservation is an essential part of self-government. Suspending the Tribes' authority to tax, based on no showing of any significant abuse of that authority, would undermine Tribal governments at the very time they are called upon to fill the financial gap caused by federal budget cuts.

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